ARTICLE

Legal Vortex in the Strait of Hormuz

JAMES KRASKA*

The regime of straits used for international navigation is one of the central features of the United Nations Convention on the Law of the Sea (UNCLOS). Neither the United States nor Iran, however, are party to UNCLOS, and the two adversaries disagree about the application of the treaty to relations between them in the Strait of Hormuz. Iran claims that the generous navigational provisions in UNCLOS may only be enjoyed by states that are party to the Convention. The United States claims that the right of transit passage in UNCLOS is reflective of customary international law, and therefore applicable to non-parties. Transit passage permits an unrestricted right to travel on the surface, under the water, or in over flight through international straits. The dispute is complicated by Iran's claim to a territorial sea that is twelve nautical miles in width — another key provision of UNCLOS, which departs from the historic norm of three nautical miles. Iran claims that the twelve nautical mile territorial sea is now part of customary law, but rejects the notion that other states enjoy the right of transit passage. The two regimes, however, are inseparable — Iran may not have a twelve nautical mile territorial sea, and yet disregard the rights of other states to exercise transit passage in the Strait of Hormuz.

Introduction 324
A. Legal Vortex and the Next Crisis 326
1. Iran's Position 327
2. The U.S. Position 328
B. Innocent Passage in State Practice 329

* James Kraska is Professor, Stockton Center for the Study of International Law at the United States Naval War College and Senior Fellow, Center for Oceans Law and Policy at University of Virginia School of Law. During 2013 to 2014, he was the Mary Derrickson McCurdy Visiting Scholar at Duke University Marine Laboratory. The author thanks Professor Wolff Heintschel von Heinegg, Professor Sean Henseler, and Professor Raul "Pete" Pedrozo for their review and helpful comments.

Electronic copy available at: https://ssrn.com/abstract=2472065

I. The Geographic and Political Strait 330
A. "Knife Fight in a Phone Booth" 332
B. Lack of Treaty Relationship 335
II. Iran and the Hague and Geneva Conferences 336
A. Hague Conference 1930 338
B. The First Geneva Conference 344
C. The Second Geneva Conference 346
III. Iran and the Third United Nations Conference 347
A. Innocent Passage in Straits 349
B. Nature of the "Package Deal" 354
C. Transit Passage in Straits 357
Conclusion 359

INTRODUCTION

This Article resolves long-standing confusion over the legal regime that applies to passage through the Strait of Hormuz.[1] Iran and the United States profoundly disagree about the applicable international law that applies to transit of foreign warships in the Strait of Hormuz, a narrow stretch of water through which travels seventeen million barrels of oil per day — twenty percent of the world total. Surprisingly, these important legal questions have been virtually ignored, even though the Strait of Hormuz has been the locus of conflict between Iran and the West in the past, and will be ground zero in any war in the region.[2]

1. A note on nomenclature: This article sticks with the historic term, "Persian Gulf," rather than the more contemporary U.S. reference, "Arabian Gulf." The term, "Persian Gulf" is merely historic, and this usage dates to the time of Ptolemy. C. Edmund Bosworth, *The Nomenclature of the Persian Gulf*, *in* THE PERSIAN GULF STATES: A GENERAL SURVEY xvii–xxxvi (Alvin J. Cottrell ed., 1980), *reprinted in* C. Edmund Bosworth, *The Nomenclature of the Persian Gulf*, 30 IRANIAN STUDIES 77, 88–89 (1997) (early Portuguese explores adopted the name "Persian Gulf").

The more recent name, "Arabian Gulf," emerged out of Arab nationalism in the 1960s and has become a way to vie for political leverage against Iran. Iran is fairly testy about the issue. During the 34th Plenary Meeting of the Second Session of the Third United Nations Conference on the Law of the Sea in 1974, for example, Iran responded to the delegate of the United Arab Emirates, who referred to the body of water as the "Arabian Gulf." The Iranian representative called the term "Arabian Gulf," "improper" and a "fabricated label," of "recent vintage," and a "distortion of fact." Third United Nations Conference on the Law of the Sea, 1973–1982, *34th Mtg.*, at 140–42, U.N. Doc. A/CONF.62/SR.34 (July 9, 1974); *see also* Richard Spencer, *Iran Threatens Flight Ban over 'Persian' Gulf Name Row*, TELEGRAPH (London), Feb. 23, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/middleeast/iran/7293430/Iran-threatens-flight-ban-over-Persian-Gulf-name-row.html (noting that Iran threatens to ban airlines from landing in the country unless they acknowledge the body of water is properly called the "Persian" Gulf).

2. The few scholarly articles that focus on Iran and the peacetime law of the sea in the Strait of Hormuz, for example, are more than thirty years old and do little to resolve the disagreement. *See* ALI A. EL-HAKIM, THE MIDDLE EASTERN STATES AND THE LAW OF THE SEA 15–17 (1979) (noting that innocent passage applies in the Strait of Hormuz, unless the Third United Nations Conference on the Law of the Sea adopts a transit passage regime); CHARLES G. MACDONALD, IRAN, SAUDI

Electronic copy available at: https://ssrn.com/abstract=2472065

This analysis is not theoretical; despite their lack of official diplomatic contact, the United States and Iran have sparred over questions of passage rights in the strait.[3] The United States is unabashed that it enjoys an immutable right to freedom of navigation in the Strait of Hormuz, whereas Iran insists that it may regulate traffic through the Strait and restrict the passage of warships. The legal riddle and intransigence formed by the claims and counter-claims in the Strait of Hormuz begs for concrete analysis to inform scholars and policymakers.

The standoff is especially complicated because the United States and Iran are not parties to the United Nations Convention on the Law of the Sea (UNCLOS).[4] Both states have bypassed UNCLOS, the one multilateral treaty positioned to resolve their differences. Their status as holdouts colors every aspect of the bilateral legal relationship in the Strait of Hormuz. Their dispute is also layered and made more complex by both states subscribing to some terms of the treaty, but rejecting others. Without adherence to a common rule set, the rivals embrace incompatible views of the source and content of the laws that govern passage through the strait.

The legal relationship between the coastal State of Iran and the maritime rights of U.S. warships is distinctive, as every other coastal State that sits astride a major international strait is party to UNCLOS or another governing treaty. The Montreux Convention, for example, specifies rules for warship transit through the Turkish Straits of the Bosporus and Dardanelles.[5] Unlike disputes regarding the Turkish Straits, however, disputes over legal rights in the Strait of Hormuz have strategic implications beyond regional security and could affect global peace and security.

ARABIA, AND THE LAW OF THE SEA: POLITICAL INTERACTION AND LEGAL DEVELOPMENT IN THE PERSIAN GULF (1980); Charles G. MacDonald, *Iran's Strategic Interests and the Law of the Sea*, 34 MIDDLE E. J. 302 (1980); Charles G. MacDonald, *The Role of Iran and Saudi Arabia in the Development of the Law of the Sea*, 1 J. S. ASIAN & MIDDLE E. STUD. 3 (1978); S.H. Amin, *The Regime of International Straits: Legal Implications for the Strait of Hormus*, 12 J. MAR. L. & COM. 387 (1981); S. Milan, *Innocent Passage Through the Strait of Hormuz*, 40/41 REVUE HELLENIQUE DE DROIT INTERNATIONAL 247 (1988); Nilufer Oral, *Transit Passage Rights in the Strait of Hormuz and Iran's Threats to Block the Passage of Oil Tankers*, 16 AM. SOC'Y INT'L L. INSIGHTS, no. 16, May 3, 3012; Ronnie Ann Wainwright, *Navigation Through Three Straits in the Middle East: Effects on the United States of Being a Nonparty to the 1982 Convention on the Law of the Sea*, 18 CASE W. RES. J. INT'L L. 361 (1986); Martin Wählisch, *The Iran–U.S. Dispute, the Strait of Hormuz, and International Law*, 37 YALE J. INT'L L. ONLINE 22 (2012).

3. The adversaries have appeared before the International Court of Justice against each other twice. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (United States v. Iran Hostages Case), 1980 I.C.J. 3 (May 24); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6); Pieter H.F. Bekker, *Oil Platforms (Iran v. United States)*, 98 AM. J. INT'L L. 550 (2004); Pieter H.F. Bekker, *Oil Platforms (Iran v. United States)*, 91 AM. J. INT'L L. 518 (1997).

4. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

5. Montreux Convention Regarding the Regime of the Straits, July 20, 1936, 173 L.N.T.S. 213; C.G. Fenwick, *The New Status of the Dardanelles*, 30 AM. J. INT'L L. 701, 704 (1936); *see also* UNCLOS, *supra* note 4, art. 35(c).

Electronic copy available at: https://ssrn.com/abstract=2472065

The bitter legal dispute over the right of passage, especially by foreign warships, military aircraft, and submarines, has simmered for decades, and is a volatile element of the broader confrontation to stop Tehran's nuclear program. In times of crisis at home or abroad, Iran has tightened its regulatory hold on the strait by boarding ships and threatening to close the strait to warship transits, which incites pushback from the United States. While Iran's rejection of United Nations Security Council action to enforce the nuclear nonproliferation regime has captured widespread attention, there is virtually no contemporary analysis of the far-reaching disagreement between Iran and the United States on the international law of the sea, and in particular, the appropriate legal regime in the Strait of Hormuz.[6]

As a heavy user of the Strait of Hormuz for both naval operations and oil tanker traffic, and a global proponent of international law adjudication and structured dispute resolution, the United States has a keen interest in better understanding the legal regime in the Strait and the appropriate distribution of rights and obligations that apply along the waterway. Experience in the *Oil Platforms Case* indicates that Iran is unafraid to bring suit against the United States before the International Court of Justice to challenge the legality of U.S. warship operations near its coast.[7] Thus, it is important to conduct an unbiased assessment of the issue because legal determinations may have strategic consequences.

Both Iran and the United States insist the law is on their side, and the legal dispute serves as a destabilizing backdrop to other dimensions of U.S.-Iranian relations. What is the answer to this dilemma? This Article concludes that the United States is not entirely correct in its claim that it enjoys unimpeded freedom of navigation through the Strait as a feature of customary international law. In fact, the navigational regime of nonsuspendable innocent passage was in force for passage through international straits long before the adoption of UNCLOS in 1982. Until or unless it joins UNCLOS, the United States enjoys only the right of nonsuspendable innocent passage in the Strait of Hormuz, but at the same time, Iran is limited to enforcement of only a three nautical mile territorial sea rather than the contemporary standard of twelve nautical miles.

A. Legal Vortex and the Next Crisis

The disagreement between Iran and the United States over the application of the international law of the sea in the Strait of Hormuz increases

6. S.C. Res. 1696, U.N. Doc. S/RES/1696 (July 31, 2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (Dec. 27, 2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (Mar. 24, 2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (Mar. 3, 2008).

7. *Oil Platforms*, 2003 I.C.J. 161.

Electronic copy available at: https://ssrn.com/abstract=2472065

the chance of war. Perhaps not surprisingly, the antagonists disagree on the source as well as the content of the law that applies in the Strait. With the January 8, 2013 accession by Timor Leste, there are now 165 States party to UNCLOS. The treaty recognizes that coastal States may claim a twelve nautical mile territorial sea, measured from the low water mark running along the shore.[8] Ships of all nations enjoy the right of innocent passage through the territorial sea.[9] On the other hand, coastal States have broad and durable security interests in the territorial sea, and may prescribe and enforce laws that condition or preclude altogether the surface transit of foreign warships.

When overlapping territorial seas connect one area of the high seas or exclusive economic zone (EEZ) to another area of the high seas or EEZ, this also constitutes a strait used for international navigation under the terms set forth in UNCLOS.[10] States are entitled to exercise the right of transit passage through such straits used for international navigation. The regime of transit passage affords more rights to users of the strait than innocent passage. In most circumstances, innocent passage can be suspended by the coastal State; transit passage cannot be suspended. Transit passage also allows submerged transit and overflight of aircraft through the strait.[11] Only surface transits are permitted for ships engaged in innocent passage. In the absence of acceptance of UNCLOS, however, the United States and Iran cannot use these clear rules as a guide and therefore must revert to legacy treaties, such as the 1958 Convention on the Territorial Sea and Contiguous Zone (Territorial Sea Convention),[12] as well as customary international law, to determine their respective rights and duties in the strait.

1. Iran's Position

In contrast to the generous navigational provisions of transit passage contained in UNCLOS, the Territorial Sea Convention affords ships of all nations the more limited right of nonsuspendable innocent passage in straits overlapped by territorial seas.[13] Tehran asserts that the navigational regime of transit passage through straits used for international navigation is solely a feature of UNCLOS, and therefore the privilege of transit passage is unavailable to non-parties, such as the United States. Furthermore,

8. UNCLOS, *supra* note 4, art. 3–5.

9. *Id.* art. 17.

10. *Id.* art. 37.

11. *Id.* arts. 38(1)–(2).

12. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964).

13. *Id.* arts. 14, 16.

Electronic copy available at: https://ssrn.com/abstract=2472065

the 1958 treaty entitles States to exercise innocent passage in straits, which excludes submerged submarines and aircraft in flight.

Iran is not a party to UNCLOS, and therefore is under no compunction to recognize legal regimes therein unless they have become customary law and therefore binding on all nations. Since Iran is not a party to UNCLOS, it does not enjoy a twelve nautical mile territorial sea and instead may claim only the historic three nautical miles. Iran has signed, but not ratified, the 1958 Territorial Sea Convention. As a non-party to the treaty, Iran is not legally bound to its terms, again, unless the provisions of the treaty reflect customary international law. Under article 18 of the Vienna Convention on the Law of Treaties (Vienna Convention), however, Iran has a more limited duty simply not to "defeat the object and purpose" of the 1958 treaty because it is a signatory.[14]

2. The U.S. Position

Since the United States is not party to UNCLOS, it does not automatically enjoy the right of transit passage through straits used for international navigation if the coastal state also is not a party to the treaty. The United States counters that although the regime of transit passage through straits used for international navigation is reflected in UNCLOS, it springs from customary international law, rather than being a creation of the terms of the treaty. Although transit passage is codified in article 38 of UNCLOS, it merely reflects long-standing state practice and *opinio juris*.

In a commentary accompanying a September 23, 1994 letter from the Secretary of State to the President on the Law of the Sea Convention, the regime of transit passage "protects long-standing navigation and overflight rights in international straits through the concept of transit passage."[15] Interestingly, while the 2007 United States Senate Treaty Report on UNCLOS claims that innocent passage is a right enjoyed under customary international law, it does not assert that transit passage has the same status.[16] This omission suggests that the United States views the customary rights of transit passage as at least weaker than those of innocent passage, but does not alter the American position that transit passage is part of custom and state practice.

The U.S. position represents the conventional view. In 1992, for example, in a statement to the Secretary-General of the United Nations, the Ministry of Foreign Affairs of the Kingdom of Thailand concluded that

14. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 18 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

15. *Law of the Sea Convention: Letters of Transmittal and Submittal and Commentary*, DISPATCH U.S. DEP'T OF STATE SUPPLEMENT, Feb. 1995, at 1, 2, 13.

16. *See* CONVENTION ON THE LAW OF THE SEA REPORT, S. REP. NO. 110-9, at 12, 20 (1st Sess. 2007), *available at* http://www.gc.noaa.gov/documents/UNCLOS-Sen-Exec-Rpt-110-9.pdf.

Electronic copy available at: https://ssrn.com/abstract=2472065

the "regime of transit passage has been widely accepted in general terms by the international community and has become part of the practice of States, both of States bordering straits as well as of shipping States."[17] According to this view, even though the United States is not a party to UNCLOS, therefore, it nonetheless enjoys the right of transit passage through international straits as a matter of historical practice and a history of legal obligation among states. To put a final point on it, the United States rejects Iran's claim of broad security competence over the territorial sea, since even article 16(4) of the 1958 Territorial Sea Convention precludes the coastal State from suspending innocent passage.

B. Innocent Passage in State Practice

Despite the disagreement over transit rights, it appears that the minimum agreement between Washington and Tehran must include a right by the United States of nonsuspendable innocent passage of warships in the Strait of Hormuz under article 16(4) of the 1958 Territorial Sea Convention, complemented by a right of submerged travel and overflight through the Strait beyond Iran's three nautical mile territorial sea.

The appropriate legal regime for passage through the Strait of Hormuz — either innocent passage or transit passage — is inextricably tied to the collateral issue of the width of the territorial sea of Iran and Oman. During negotiations for the 1958 Convention, most nations accepted the rule that coastal States may claim sovereignty only over a three nautical mile territorial sea. The extension of the territorial sea from three nautical miles in 1958 to twelve nautical miles by the 1970s is a central characteristic of UNCLOS that forever changed the law of the sea.

Expansion of the territorial sea from three to twelve nautical miles was the central bargain in UNCLOS, and is balanced by the replacement of innocent passage with transit passage in straits as part of the overall package deal. Iran is not a party to UNCLOS, and thus does not enjoy a twelve nautical mile territorial sea, as well as other benefits of the UNCLOS package deal. Iran also does not have to avail itself to transit passage by the ships, submarines, and aircraft of other states. Tehran, therefore, may insist that the United States enjoys only nonsuspendable innocent passage through those parts of the Strait of Hormuz overlapped by its three nautical mile territorial sea. The extension of the zone to twelve nautical miles in breadth is a benefit conferred on States parties to UNCLOS as a key part of a comprehensive bargain. In such cases, whether the United States is correct that it is entitled to transit passage as a matter of customary law

17. Permanent Rep. of Thailand to the U.N., Letter dated Feb. 18, 1993 from the Permanent Rep. of Thailand to the United Nations addressed to the Secretary-General, U.N. Doc. A/48/90 (Feb. 22, 1993).

Electronic copy available at: https://ssrn.com/abstract=2472065

becomes somewhat immaterial because U.S. warships, aircraft, and submarines would enjoy high seas freedoms beyond Iran's three nautical mile territorial sea. Since the Strait of Hormuz is more than twenty miles wide, the area over which Iran could exercise sovereignty and require innocent passage is quite limited. The practical upshot is that U.S. ships, aircraft, and submarines would exercise unrestricted high seas freedoms seaward beyond Iran's three nautical mile territorial sea. Notably, these rights are even more generous than transit passage in UNCLOS.

I. THE GEOGRAPHIC AND POLITICAL STRAIT

Among some 125 international straits in the world, about sixty may be considered major world trade routes — essential sea lines of communication.[18] The four most important artifacts of industrial infrastructure on the planet are the Panama Canal, the Suez Canal, the Strait of Malacca, and the Strait of Hormuz. Each is an economically and strategically critical asset, but because the Strait of Hormuz sits astride the conflict-prone region of the Persian Gulf, it serves as a metaphor for the separation of East and West, North and South, and Sunni and Shi'ite. These fault lines meet in the Strait, which, at its narrowest point, is only twenty-one miles wide. An international maritime boundary runs equidistant between the shores of Iran in the north and Oman in the south.[19]

The Persian Gulf has been a key transportation node in the global economy since the last days of World War II, when the British resorted to Persian oil supplies. From 1953 until 1979, the United Kingdom helped install into power and then strengthen Reza Shah Pahlavi of Iran as a bulwark in the Persian Gulf and Strait of Hormuz. The Royal Navy maintained forces in the Persian Gulf until 1971, when it requested the U.S. Navy to fill that role. Following the fall of the Shah and the hostage crisis at the U.S. embassy in Tehran in November 1979, the United States became concerned that the Strait could be closed. The 1979 Christmas invasion of Afghanistan by the Soviet army heightened concern that the flow of oil could be interrupted. After the seizure of the American embassy and the downfall of Shah Pahlavi that same year, Iran has bedeviled U.S. Middle East policy.

On September 27, 1980, the United States issued a statement declaring that it would take military action to ensure that the Strait of Hormuz remained open to international shipping. During the Iran-Iraq War from

18. *See, e.g.*, LEWIS M. ALEXANDER, NAVIGATIONAL RESTRICTIONS WITHIN THE NEW LOS CONTEXT: GEOGRAPHICAL IMPLICATIONS FOR THE UNITED STATES 246–49 (Offshore Consultants, Inc., Final Report under Contract MDA-903-84-C-0276, Defense Supply Service — Washington, Dec. 1986).

19. General Provisions on Ships' Routeing, IMO Res. A.572(14), § 4 (Nov. 20, 1985).

Electronic copy available at: https://ssrn.com/abstract=2472065

1980–1988, Iran stationed military forces irregularly on small islands just inside the Strait of Hormuz to interdict shipping bound for Iraq and its Arab allies.

As a result of Iranian attacks on shipping, the United States and Iran fought a miniature naval war in the Persian Gulf from 1984–1987 called the "tanker war."[20] More than 400 civilian seafarers died in attacks by Iran and 500 commercial vessels were damaged.[21] The United States claimed Iran sowed mines in the shipping lanes and conducted small boat attacks on oil tankers and American warships. On January 20, 1984, U.S. Central Command issued a *Notice to Airmen* and then released a parallel *Notice to Mariners* the following day that warned ships and aircraft not to approach too closely to naval forces on patrol in the Gulf.[22] The USS *Samuel B. Roberts*, the USS *Princeton*, and the USS *Tripoli* all struck moored contact mines while on patrol in the Gulf. In response, the U.S. Navy destroyed the *Sahan* and *Sablan*, two former American frigates left over from the Shah's defense buildup, and burned two derelict oil platforms that it claimed were used to stage the attacks. Iran took its case to the International Court of Justice, which returned an opinion largely favorable to Iran.

The United States returned to the Persian Gulf during Operation Desert Shield/Desert Storm to eject Saddam Hussein's army from Kuwait, and then maintained a no-fly zone over parts of Iraq until 2003, in part through the use of naval aviation stationed aboard aircraft carriers on patrol in the Gulf.[23] In 1998, President Clinton ordered the launch of a battery of cruise missiles from ships and submarines operating in the Gulf to destroy terrorist targets in the region.

The United States and the United Kingdom led a coalition of some 20 nations to topple the Ba'athist regime in Iraq from 2003–2011. More recently, former Secretary of State Henry Kissinger has called dealing with Iran's nuclear program the most urgent foreign policy question for President Barack Obama's second term of office, meaning that once again U.S. warships wait on station for combat in the region.[24]

The mix of legal disputes and political-military tension has great implications for the global economy. In 2011, the daily world oil production was

20. *See* GEORGE K. WALKER, THE TANKER WAR, 1980–88: LAW AND POLICY (2000). The U.S. Navy conducted *Operation Earnest Will* to escort Kuwaiti oil tankers in the Gulf and also fought a short, intense engagement against the Iranian Navy, *Operation Praying Mantis*.

21. Securing America's Future Energy, *Iran Launches 2012 Campaign to Rattle Oil Markets*, INTELLIGENCE REPORT, Jan. 11, 2012, at 1, 2.

22. Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 78 AM. J. INT'L L. 884, 884–85 (1984).

23. These missions were called *Operation Southern Watch*, 1991–2003 and *Operation Northern Watch*, 1997–2003.

24. Henry A. Kissinger, *Job One Abroad: Iran*, WASH. POST, Nov. 18, 2012.

Electronic copy available at: https://ssrn.com/abstract=2472065

eighty-seven million barrels.[25] Seventeen million barrels — 19% of total world production and more than 35% of seaborne traded oil — transits the Strait every day.[26] While the amount of oil the United States receives from the Gulf has been in steady decline in recent years, it still receives 13% of its oil from the Persian Gulf, which includes 8% from Saudi Arabia.[27] Japan, for example, receives 75% of its crude oil imports from just four Gulf countries: Saudi Arabia (33%), United Arab Emirates (23%), Qatar (10%), and Kuwait (6.5%).[28] Qatar also exports about two trillion cubic feet per year of liquefied natural gas (LNG) through the Strait of Hormuz, or almost 20% of the global LNG trade.[29] In 2011, before sanctions took effect, 11% of Japan's oil imports came from Iran. More importantly, however, the world oil market trades on a global exchange, so a shortage in one area will still create price reverberations everywhere.[30] Furthermore, the market trades at a marginal (market clearing) world price, so even small disruptions in the amount of oil available on the market can result in significant volatility in energy prices.

A. "Knife Fight in a Phone Booth"

In each of the past maritime conflicts with Iran, the United States enjoyed large base complexes in littoral states of the Persian Gulf, and the U.S. fleet operated in easy range of their targets. The United States had a monopoly on precision-guided munitions and secure communications networks. Any new scenario with Iran calls into question each of these assumptions, and strengthens Tehran's hand. The United States has largely withdrawn its substantial ground footprint in the region, especially from Saudi Arabia.

Today, Iran is especially adept at exploiting its geographic proximity to the Strait as one of its few pressure points against more powerful adversaries. The Strait of Hormuz naturally channels shipping into a targeting funnel vulnerable to Iran's missiles and mines. One senior Navy officer said the Strait has little room for maneuver and little space to buy time: "'It would be like a knife fight in a phone booth[.]'"[31] Iran has threatened to

25. U.S. ENERGY INFO. ADMIN., WORLD OIL CHOKEPOINTS 1 (Aug. 22, 2012).

26. *Id.* at 3.

27. Corey Flintoff, *Where Does America Get Oil? You May be Surprised*, NPR (Apr. 12, 2012, 10:24 AM), http://www.npr.org/2012/04/11/150444802/where-does-america-get-oil-you-may-be-surprised.

28. Kana Inagaki & Mitsuru Obe, *Japan Prepares for Cuts to Iranian Oil Imports*, WALL ST. J., Jan. 6, 2012, http://www.online.wsj.com/article/SB10001424052970203471004577142423285170792.html.

29. U.S. ENERGY INFO. ADMIN., *supra* note 25, at 3.

30. *See, e.g.*, Jan J. J. Groen & Paolo A. Pesenti, *Commodity Prices, Commodity Currencies, and Global Economic Developments*, *in* COMMODITY PRICES & MARKETS 15, 19 (Takatoshi Ito & Andrew K. Rose eds., 2011).

31. Elisabeth Bumiller, Eric Schmitt & Thom Shanker, *Top Iran Leader Is Warned by U.S. on Strait*

Electronic copy available at: https://ssrn.com/abstract=2472065

close the Strait in the event that Israel or the United States conducts military strikes against the country's nuclear program.

The relationship is always testy. In January 2012, General Ayatollah Salehi warned the USS *John C. Stennis* not to reenter the Gulf during an Iranian war game. "'I advise, recommend and warn them [the Americans] over the return of this carrier to the Persian Gulf because we are not in the habit of warning more than once.'"[32] Today, much smaller U.S. installations in Bahrain and Qatar are more vulnerable, as they sit less than five minutes away from Iranian ballistic missiles garrisoned across the Gulf — 105 nautical miles from Bahrain and 149 nautical miles from the sprawling Al Udeid air base. Without secure runways on the Gulf, U.S. power projection depends on aircraft carriers. Not completely invulnerable to Iranian mines and missiles inside the Persian Gulf, the massive ships may resort to launching attack aviation from the Arabian Sea, diminishing both range and time on station inside the Strait.

In the face of overwhelming conventional power by the United States, Iran has few conventional military options that augur in its favor. Tehran instead likely would resort to weapons of mass destruction, small unit marine guerilla forces, and swarming tactics to inflict maximum damage on oil shipping. Closure of the Strait of Hormuz is at the top of the list, as it hits the United States at the foundation of its power — the global economy and America's perch atop a grandly formal Eurasian alliance system. The oil market shock caused by a closure of the Strait would separate the United States from its Arab state friends in the Middle East that rely on bringing oil to world markets, and European and Asian allies who are dependent on Gulf oil. In this rather unconventional way, Iran has a global power projection capability, which is why the Chief of Naval Operations stated last year: "'If you ask me what keeps me awake at night, it's the Strait of Hormuz and the business going on in the Arabian Gulf[.]'"[33]

The Pentagon realizes the Strait is vulnerable. ""The simple answer is yes, they can block it,'" stated Chairman of the Joint Chiefs of Staff General Martin Dempsey on January 8, 2012.34 For the past twenty years, Iran has invested heavily in the asymmetric capabilities needed to bypass the more powerful U.S. fleet and disrupt merchant shipping and threaten naval

---

Threat, N.Y. TIMES, Jan. 13, 2012, at A1.

32. Wil Longbottom, *'We Are Not in the Habit of Warning More than Once': Iran Tells U.S. Not to Send Aircraft Carrier Back to Gulf After Missile Test*, MAIL ONLINE (Jan. 3, 2012, 7:43 EST), http://www.dailymail.co.uk/news/article-2081652/We-habit-warning-Iran-tells-U-S-send-aircraft-carrier-gulf-missile-test.html; Wil Longbottom, *Iran Military Warns U.S. Aircraft Carrier to Stay Away from Persian Gulf*, TELEGRAPH (London) (Jan. 3, 2012, 8:29 GMT) (internal edits omitted), http://www.telegraph.co.uk/news/worldnews/middleeast/iran/8989023/Iran-military-warns-US-aircraft-carrier-to-stay-away-from-Persian-Gulf.html.

33. Bumiller, Schmitt & Shanker, *supra* note 31, at A1.

34. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

forces in the Strait. Iran has concentrated on acquiring naval mines, fleets of heavily armed speedboats, and powerful anti-ship cruise missiles, secretly situated along the bottleneck.

The regular Iranian Navy is relatively professional, and it operates an aging conventional surface fleet that is the remnant of the Shah's constabulary force. The more politically favored and far less predictable Iranian Revolutionary Guard Corps Navy (IRGCN), however, is the country's guerilla force at sea. The IRGCN has responsibility for security in the Strait of Hormuz, and since the early-1990s, it has invested heavily to keep U.S. forces off balance.35 The highly ideological IRGCN has 20,000 personnel and 5,000 Revolutionary Guard Marines.36 These forces regularly exercise war plans to close the Strait. The force operates from bases at Bandar Abbas and Qeshm along the Strait, practicing small boat swarm exercises against international shipping traffic with as many as forty boats.37

Iran's naval inventory includes cruise missiles (generally first generation Chinese copies of the French Exocet missile and the indigenous Nasr missile), marine mines, Kilo- and Yono-class submarines, and Peykaap fast attack craft, the latter of which are armed with cruise missiles and torpedoes. These proxy forces are dispersed and mobile, and have mastered swarm techniques to overwhelm more powerful foes. More than a decade ago, a $250 million classified Department of Defense war game concluded that agile swarms of IRGCN speedboats could inflict major damage on the U.S. Navy's powerful warships in a conflict. In the game, the United States lost sixteen major warships, including an aircraft carrier, to swarms of enemy speedboats.38

On January 6–7, 2008, five armed Iranian speedboats approached three American warships in international waters near Hengam Island and maneuvered aggressively as they radioed threats that the ships would be "blown up." Typically, however, American naval forces routinely transit the Strait and maintain a regular presence in the Gulf without incident. Aircraft carrier strike groups have operated inside the Persian Gulf since late-1990; since then the United States has routinely operated two carriers in the Gulf.39 The United States and the United Kingdom have forward de-

35. James Kraska, *Gatekeepers of the Gulf*, PROC. U.S. NAVAL INST., Mar. 1994, at 44, 44–47.

36. ERIC WERTHEIM, THE NAVAL INSTITUTE GUIDE TO COMBAT FLEETS OF THE WORLD 326 (15th ed. 2007).

37. Jeremy Binnie, *Iranian Naval Forces: Gulf Guerillas*, IHS JANE'S DEFENCE WEEKLY, Feb. 6, 2013, at 34 (describing *Great Prophet 5*'s exercise of April 2010 involving forty small boats in a simulated attack).

38. Bumiller, Schmitt & Shanker, *supra* note 31, at A1.

39. Aircraft carriers initially entered the Gulf in response to Iraq's invasion of Kuwait in August 1990, not to address an Iranian threat. Before 1990, the U.S. Navy did not operate in the Gulf out of sensitivity to Soviet perceptions of being "surrounded," and because of the navigational hazard of numerous stub oil platforms that littered the Gulf. *See, e.g.*, Robert C. Rubel, *Talking About Sea Control*,

Electronic copy available at: https://ssrn.com/abstract=2472065

ployed mine countermeasure ships to Bahrain. We may infer from U.S. submarine port visits to states inside the Gulf and reports of several collisions between submerged U.S. submarines and surface ships that U.S. submarines patrol the Strait.40 The dire financial condition of the U.S. government budget and mandatory defense cuts as part of the fiscal compromise of sequester will make it more difficult for the U.S. fleet to operate in force. Recently the Pentagon was unable to deploy USS Harry S. Truman (CVN-75) to the Persian Gulf because the Navy could not allocate the programmed $3.3 billion to overhaul the ship as budget cuts loom.41 A second nuclear-powered aircraft carrier, the USS Abraham Lincoln (CVN-72), was delayed for deployment to the Gulf due to a $92 million shortfall in nuclear refueling.42

In January 2012, the Obama administration relied on a secret channel of communication to warn Iran's supreme leader, Ayatollah Ali Khamenei, that any attempt by Iran to close the Strait of Hormuz was a "'red line'" that would cause America to respond.[43] More bluntly, General Martin E. Dempsey, the chairman of the Joint Chiefs of Staff, said the United States would "'take action and reopen the strait,'" if Iran tried to close it. His statement was supported by Defense Secretary Leon E. Panetta, who told troops at a public gathering in January 2012 that the United States would not tolerate Iran's closing of the strait.[44]

B. Lack of Treaty Relationship

Normally, the rights of States situated along straits used for international navigation, such as Iran, and the rights of other nations to use the strait, such as the United States, are governed by the rules in UNCLOS. The treaty was adopted by a United Nations sponsored conference in 1982 af-

---

63 NAVAL WAR C. REV. 38, 38 (2010).

40. *See* Andrew Scutro, *Report: Lax Leadership Led to Hormuz Collision*, NAVY TIMES (Nov. 15, 2009, 8:17 AM), http://www.navytimes.com/article/20091115/NEWS/911150307/Report-Lax-leadership-led-Hormuz-collision (discussing the collision between submarine USS *Hartford* and amphibious warship USS *New Orleans* in the Strait of Hormuz); Sam Fellman, *Attack Sub Collides with Ship in Persian Gulf*, NAVY TIMES (Jan. 10, 2013, 6:10 PM), http://www.navytimes.com/article/20130110/NEWS/301100312/Attack-sub-collides-ship-Persian-Gulf (noting submarine USS *Jacksonville* collided with a small civilian ship in the Persian Gulf). In one case, the submarine USS *Newport News* was following behind a Very Large Crude Carrier *Mogamigawa*, when it was sucked into the oil tanker by the low pressure effect of the larger ship. John M.R. Bull, *Skipper of USS Newport News Relieved of Duty*, DAILY PRESS (Newport News, VA), Jan. 30, 2007, at A1.

41. Dion Nissenbaum, *Pentagon Readies Budget Ax: Naval Deployments, Air Force Flying Time and Army Training Face Cuts in March*, WALL ST. J. (Feb. 11, 2013, 9:10 PM ET), http://online.wsj.com/news/articles/SB10001424127887323511804578298401333070928; Sam LaGrone, *Navy: Lincoln Refueling Delayed, Will Hurt Carrier Readiness*, USNI NEWS (Feb. 8, 2013, 3:01 PM), http://www.news.usni.org/2013/02/08/navy-lincoln-refueling-delayed-will-hurt-carrier-readiness.

42. LaGrone, *supra* note 41.

43. Bumiller, Schmitt & Shanker, *supra* note 31, at A1.

44. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

ter nine years of negotiation. Preceded by three failed attempts to negotiate a comprehensive multilateral oceans framework — at The Hague in 1930 and in Geneva in 1958 and 1960 — UNCLOS marks a singular achievement in world order that is second in importance only after the Charter of the United Nations.

Since its adoption, the Law of the Sea Convention has begun to fill the role envisioned by Singapore Ambassador and President of the Conference T. B. Tommy Koh as the constitution for the world's oceans.[45] The framework forms an umbrella of global legal authority that is supplemented by some fifty additional treaties, and hundreds of codes and guidelines to form a comprehensive set of legal regimes and norms that apply throughout the oceans.

One of the principal achievements of UNCLOS was the determination of the lawful width of coastal State territorial waters, and the associated navigational regimes that apply within them. The rules governing navigation are particularly important in international straits overlapped by territorial seas. In the case of U.S. and Iranian rights and duties in the Strait of Hormuz, however, the rules are much less certain because neither country is party to the omnibus treaty. The two states are among the most notorious holdouts, yet they also accept many terms of the Convention — just not necessarily the same ones. The absence of a clear and common rulebook and lack of agreement on the relevant rules that apply to the Strait of Hormuz generates regional instability.

The rivals may draw upon several discrete sources of international law applicable to the Strait of Hormuz, including customary international law, the League of Nations' Hague Conference (1930), the First (1958) and Second (1960) United Nations Conferences on the Law of the Sea held in Geneva, the negotiations of the Third United Nations Conference on the Law of the Sea (1973–1982) conducted over eleven sessions at various locations, including New York City, and the comprehensive treaty it produced, the United Nations Convention on the Law of the Sea, which was adopted by the conference on December 10, 1982, in Montego bay, Jamaica.

II. IRAN AND THE HAGUE AND GENEVA CONFERENCES

By the early-eighteenth century, Catholic and Protestant legal scholars accepted the rule that no state could purport to lay claim to the ocean

45. Tommy T. B. Koh, *A Constitution for the World's Oceans*, *reprinted in* I UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 11 (Myron H. Nordquist ed., 1985) (adapted from Statement by Pres. Koh at the final session of the Third United Nations Conference on the Law of the Sea (Dec. 6 and 11, 1982)).

Electronic copy available at: https://ssrn.com/abstract=2472065

common.[46] The doctrine arose from the idea that customary international law recognized the unimpeded right of transit by all nations through international straits as a principal of natural law. In his landmark volume in the Law of Nations, for example, Swiss diplomat Emmerich de Vattel (1714–1767) stated:

> It must be remarked with regard to the *streights* [*sic*], that when they serve for a communication between two seas, the navigation of which is common to all, or to many nations, he who possess the *streight*, cannot refuse others a passage through it, provided that passage be innocent, and attended with no danger to the state. Such a refusal, without just reason, would deprive these nations of an advantage granted them by nature; and indeed, the right of such passage is a remainder of the primitive liberty enjoyed in common.[47]

Coastal States made a practical deviation from the Roman rule of *mare liberum,* or "free seas," to claim exclusive control over a narrow belt of territorial waters adjacent to the coastline.[48] Within these territorial waters, or territorial sea, the coastal State exercised complete sovereignty. Passage through straits used for international navigation, however, remained sacrosanct. In 1894, the *Institut de Droit International* met in Paris and determined straits "which serve as a passage from one free sea to another can never be closed."[49]

During the twentieth century, the territorial sea would have a confounding influence on passage through international straits. States could not agree on the breadth of territorial waters, although the "cannon shot rule" emerged as the most persuasive metric. For lack of another widely accepted standard, by the late nineteenth and early-twentieth century, the three mile standard for territorial waters remained the most popular, but by no means the sole measure of the extent of territorial waters.[50] Custom and state practice began to reflect the cannon shot rule, which entered into early American legal doctrine.[51]

---

46. Bernard G. Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 597, 598–601(1959).

47. M. D. VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS: A WORK TENDING TO DISPLAY THE TRUE INTEREST OF POWERS bk. 1, § 290 (Thomas M. Pomroy ed., S. & E. Butler 1805).

48. JAMES WILLIAMS, THE INSTITUTES OF JUSTINIAN ILLUSTRATED BY ENGLISH LAW 49–50 (2nd ed. 1893) (noting that the sea is common in English law, as in Roman law, but "for purposes of national safety, the state has a right of jurisdiction . . . for a distance . . . of a marine league from [the] low-water mark . . . .").

49. INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE XIII 330–31 (1894–95), *cited in* JOHN BASSETT MOORE, I A DIGEST OF INTERNATIONAL LAW 659 (Government Printing Office, 1906).

50. *See, e.g.*, LASSA OPPENHEIM, 1 INTERNATIONAL LAW: PEACE 127 (2d ed. 1912).

51. The U.S. view is reflected in numerous cases and diplomatic correspondence. *See, e.g.*, The Ann, 1 F. Cas. 926, 926–27 (C.C.D. Mass. 1812) ("As *The Ann* arrived off Newburyport, and within three miles of the shore, it is clear that she was within the acknowledged jurisdiction of the United

Electronic copy available at: https://ssrn.com/abstract=2472065

At the turn of the twentieth century, John Bassett Moore, who served a quasi-official capacity in penning his eight volume restatement of international law for the Department of State, accepted the extent of the "littoral" or "marginal" sea as derived from Bynkershoek and also fixed the distance at a marine league, "that is to say three marine miles or a twentieth of a degree of latitude" — formerly the range of a cannon shot.[52] Following World War I, the League of Nations set out to codify significant areas of international law. The width of the territorial sea, and the rules that pertain in it, were ripe for a final resolution by a major international conference, which met in The Hague in 1930.

A. Hague Conference 1930

In 1926, a draft convention prepared by a Committee of Experts of the League of Nations contained a "coastal sea" of three nautical miles from the "low-water mark along the whole of the coast."[53] That same instrument also confirmed the right of passage by foreign warships, although such vessels "must observe the local laws and regulations, particularly those relating to navigation, anchoring and health control."[54] Similarly, another draft convention developed by the International Law Association that same year recognized a three nautical mile territorial sea.[55]

These instruments helped to inform the preparatory work and negotiation on territorial waters for the 1930 Hague Conference on Codification of International Law. The Assembly of the League of Nations sponsored the conference in The Hague to codify three areas of international law: nationality, territorial waters and contiguous zone, and State responsibility for damage caused on their territory to foreign persons or property.

States. All the writers upon public law agree that every nation has exclusive jurisdiction to the distance of a cannon shot, or marine league, over the waters adjacent to its shores . . . . Indeed such waters are considered as a part of the territory of the sovereign."); *see also* Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804) ("The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon [the measure used by him to delimit territorial waters] . . . is an invasion of that territory . . . .").

52. RIVIER, I DROIT DES GENS 145, 146, 147, *cited in* JOHN BASSETT MOORE, I A DIGEST OF INTERNATIONAL LAW 699 (Government Printing Office, 1906).

53. *Amended Draft Convention Communicated to Various Governments by the League of Nations Committee of Experts for the Progressive Codification of International Law, with Questionnaire No. 2, January 29, 1926*, League of Nations Doc. C.196M.70 1927 V (1927), *reprinted in* George Grafton Wilson, *The Law of Territorial Waters*, 23 AM. J. INT'L L. SPEC. SUPP. 241, 366–68 (1929).

54. *Id.* (specifying that, "[i]f a serious and continued offence is committed [by a foreign warship in the territorial sea], the commander of the vessel shall receive a semi-official warning in courteous terms and, if this is without effect, he may be requested, and, if necessary, compelled, to put to sea.").

55. INT'L LAW ASS'N, *Draft Convention on Law of Maritime Jurisdiction in Time of Peace*, art. 5 (1926), *reprinted in* Geoge Grafton Wilson, *The Law of Territorial Waters*, 23 AM. J. INT'L L. SPEC. SUPP. 241, 373–375 (1929).

Electronic copy available at: https://ssrn.com/abstract=2472065

Thirty governments replied to a Preparatory Committee to address a list of questions to serve as a basis of discussion for delimitation of territorial waters.[56] The Commission on Territorial Waters at the Conference for the Codification of International Law explored the feasibility of a maritime treaty. The Conference was the first attempt to codify a systematic and multilateral body of rules for oceans governance. The first order of business was to develop a list of Bases of Discussion that would be used to negotiate a treaty on the law of the sea. Half of the twenty-eight Bases for Discussion formulated by the Preparatory Committee related to the delimitation of territorial waters, while the other half related to legal rights and obligations within the waters.[57]

The Committee first considered the appropriate breadth of the territorial sea. To inform the dialogue, states were requested to respond to the following inquiry:

> "It would seem possible to take as the point of departure the proposition that the State possesses sovereignty over a belt of sea around its coasts. This involves possession by the State in the belt of the totality of those rights which constitute sovereignty, so that it is not necessary to specify that, for example, it has legislative authority over all persons, power to make and apply regulations, judicial authority, power to grant concessions and so forth."[58]

An associated set of questions asked states about the rights of other nations in the belt and the width of the territorial waters. States considered, "'whether it is possible for special rights belonging to another State to restrict or exclude the rights of the coastal State in the belt. . . . If so, what is the extent and ground of the claim?'"[59] Replies to these questions were offered by twenty-three states. Generally, states agreed that while the coastal State may exercise sovereignty over the belt, it must "respect the restrictions which result from international law."[60] A new conference draft

---

56. *First Report Submitted to the Council by the Preparatory Committee for the Codification Conference*, 24 AM. J. INT'L L. SUPP. 1, 3 (1930); *Second Report Submitted to the Council by the Preparatory Committee for the Codification Conference*, 24 AM. J. INT'L L. SUPP. 3 (1930); *see Territorial Waters*, 24 AM. J. INT'L L. SUPP. 25, 25 (1930) (describing the bases for discussion for the issue of territorial waters); Jesse S. Reeves, *The Hague Conference on the Codification of International Law*, 24 AM. J. INT'L L. 52 (1930).

57. S. Whittemore Boggs, *Delimitation of the Territorial Sea: The Method of Delimitation Proposed by the Delegation of the United States at the Hague Conference for the Codification of International Law*, 24 AM. J. INT'L L. 541, 541 (1930); *see also* Richard W. Hale, *Territorial Waters as a Test of Codification*, 24 AM. J. INT'L L. 65, 65 (1930).

58. *Territorial Waters*, League of Nations Doc. C.74M.39 1929 V (1929), *reprinted in* 24 AM. J. INT'L L. SUPP. 25, 25 (1930).

59. *Id.* at 25–26.

60. *Id.* Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Romania, Siam, and Sweden. *Id.* at 26.

Electronic copy available at: https://ssrn.com/abstract=2472065

instrument reflected the Bases of Discussion that coastal States possess sovereignty over a belt "round its coasts" that constitute territorial waters.[61] Participating states were also asked to make recommendations on the width of the territorial sea: "three miles, six miles, range of cannon, etc."[62] Twenty-two governments replied to the question.[63] The United States suggested that territorial waters extend to a distance of three marine or nautical miles, measured from the low water mark.[64] Although states were not unanimous in their responses, a majority of states replied that the breadth of the belt is three nautical miles. Several states presented a claim in excess of three miles, and proposals for four, six or even eighteen miles were offered.[65] In the end, the relevant Bases for Discussion on a new treaty, however, stated that the "breadth of the territorial waters under the sovereignty of the coastal State is three nautical miles."[66]

The Hague Codification conference failed to reach agreement on the breadth of the territorial sea, let alone the rights and duties that applied to the coastal State and foreign flagged vessels in the zone.[67] A contemporary post-mortem by University of Michigan political scientist Jesse Reeves lamented that the cause of failure lay not in poor preparation or faulty chairmanship, but rather in the difficulty of the issue:

> Surely few matters in international law are more important than territorial waters. Few present more clearly so many opportunities for the examination of conflicting claims set forth by states to exercise jurisdiction. It may fairly be assumed that few topics present a larger factor of common intrinsic interest. But the responses of the governments had shown how far apart the responding states were. With scarcely an exception, each of the states represented upon the Commission had a double common interest in freedom of navigation of the high seas and in the maintenance of its authority over

61. Jesse S. Reeves, *The Codification of the Law of Territorial Waters*, 24 AM. J. INT'L L. 486, 490 (1930).

62. *Territorial Waters*, *supra* note 58, at 27.

63. *Id.*. Replies were made by the following Governments: South Africa, Germany, Australia, Belgium, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Portugal, Romania, and Sweden. *Id.*

64. Boggs, *supra* note 57, at 541. The marine or nautical mile was defined as the equivalent of one minute of latitude at the particular latitude concerned, which varied about nineteen meters between the equator and the poles. The distance of 1852 meters was regarded as a standard marine mile by the United States and adopted as the definition of a nautical mile by the International Hydrographic Conference at Monaco in April 1929. The Technical Subcommittee of the Commission on Territorial Waters defined the baseline as the low-water mark along the entire coast, as indicated on the charts officially used by the coastal State, "provided the latter line does not appreciably depart from the line of mean low-water spring tides." *Id.* at 542 nn.2–3.

65. *Territorial Waters*, *supra* note 58, at 27–28.

66. *Id.* at 28.

67. *See, e.g.*, Reeves, *supra* note 61, at 486.

Electronic copy available at: https://ssrn.com/abstract=2472065

> the adjacent littoral waters. Yet no two states faced the seas with the same outlook. The fundamental differences among states *vis-à-vis* the seas are geographical, and as Napoleon said, "*La politique des etats est dans leur geographie*."[68]

(The policy of the state is in their geography).

Twenty of the thirty participant states advocated a three nautical mile territorial sea, led by the maritime powers of the United Kingdom and Japan.[69] The U.S. proposal reflected U.S. law and viewed territorial waters as coextensive with the coastline to a distance of three nautical miles from shore.[70] The Scandinavian states of Iceland, Norway, Sweden, and Finland generally preferred four nautical miles, whereas a mixture of mostly Mediterranean and non-European states, which included Iran (Persia), supported a six nautical mile territorial sea.[71] Some states, such as France and Germany, were in favor of a three-mile limit, but only if it also included a separate contiguous zone. Japan and the United Kingdom led a group of states that disliked a supplementary contiguous zone.

Disagreement over the width of the territorial sea was complicated by the Bases of Discussion that recognized general application of a three nautical mile territorial sea, but then was open to certain countries, yet to be enumerated, that would be entitled to a greater width.[72] Thus, coastal States held out for a specific deal that inured special benefit to them within a system that set a three-mile standard for everyone else. These differences unraveled any prospect for a draft treaty, but the conference was not without some success.

On the matter of transit through straits, governments were asked to consider "'[c]onditions determining what are territorial waters within a strait connecting two areas of open sea or the open sea and an inland sea[,]'" when the coasts belong to a single state and when they are shared by two or more states.[73] Nineteen governments replied.[74] The comments and diplomatic correspondence discussed the legal status of the Straits of Magellan, the Bosporus and Dardanelles, and the Danish Sound Straits.

68. *Id.* at 487.

69. *Id.* at 492.

70. The U.S. position was reflected in the National Prohibition Act (41 Stat. 305), which defined the "[t]erritorial waters of the United States," as "a marginal belt of the sea extending from low-water mark outward a marine league, or 3 geographical miles . . . ." Regulations 2, § 2201 ("relating to permits as provided in Title II, National Prohibition Act"), *reprinted in* George Grafton Wilson, *The Law of Territorial Waters*, 23 AM. J. INT'L L. SPEC. SUPP. 241, 250 (1929).

71. The latter countries include Brazil, Colombia, Cuba, Spain, Italy, Latvia, Persia, Portugal, Romania, Turkey, Uruguay, and Yugoslavia. *Id.*

72. *See, e.g.*, Reeves, *supra* note 61, at 488.

73. *Territorial Waters*, supra note 58, at 35.

74. The following Governments replied: South Africa, Germany, Australia, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Romania, and Sweden. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

The Strait of Hormuz was not mentioned. All three of the aforementioned passages, however, were (and are) subject to specific treaties governing transit, and therefore had limited utility for a determination of generic rules for straits.[75]

No special treaty regulated transit through the Strait of Hormuz. The 1921 Barcelona Convention and Statute on Freedom of Transit, however, sought to protect freedom of transit of commercial goods across international boundaries.[76] The Barcelona Convention was the first multi-lateral treaty to recognize a general freedom of transit for all states, whether on land or at sea.[77] Persia became a party to the agreement on January 29, 1931, and the treaty is still in force. An annex to the treaty, which provides, "In order to ensure the application of the provisions of this Article [relative to free transit], Contracting States will allow transit in accordance with the customary conditions and reserves across their territorial waters."[78]

Most delegations at the 1930 Hague Conference reasoned that all the waters of the strait are territorial waters of the coastal State if the strait is not wider than twice the breadth of territorial waters. In straits that are shared by two coastal States and that measure less than twice the breadth of the territorial waters, the territorial waters are determined by an equidistant line drawn down the middle of the strait.[79] Points IX and X of the Bases of Discussion addressed innocent passage of foreign ships through internal waters during a time of peace,[80] including the rights of passage of merchant ships, warships, and submarines and "rights of passage of persons and goods."[81] Twenty-two governments submitted papers on the issue.[82] The replies generally accepted the notion that all vessels, including warships, enjoy the right of innocent passage, balanced by the coastal States' right to regulate the conditions of such passage.

The conference determined coastal States "should recognize the right of innocent passage through its territorial waters of foreign warships, in-

75. *See, e.g.*, George Grafton Wilson, *The Law of Territorial Waters*, 23 AM. J. INT'L L. SPEC. SUPP. 241, 281–88 (1929).

76. Barcelona Convention and Statute on Freedom of Transit, Apr. 20, 1921, 7 L.N.T.S. 11, *entered into force* Oct. 31, 1922 [hereinafter Barcelona Convention].

77. Surya P. Subedi, *The United Nations and the Trade and Transit Problems of Land-Locked States* 134, 138–40, *in* THE UNITED NATIONS AT WORK (Martin Ira Glassner ed., 1998).

78. Barcelona Convention, *supra* note 76, art. 2.

79. *Territorial Waters*, *supra* note 58, at 36.

80. Under Point XI, the rules pertaining to the territorial waters in time of war and passage of belligerent warships through the territorial waters of neutral States fall outside the purview of the conference program and instead are reflected in Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, October 18, 1907. *Id.* at 41.

81. *Id.* at 38.

82. *Id.* Replies were made by the following Governments: South Africa, Germany, Australia; Belgium, Bulgaria, Denmark, Egypt, Estonia, United States of America, Finland, France, Great Britain, India, Italy, Japan, Latvia, Norway, New Zealand, Netherlands, Poland, Romania, and Sweden. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

cluding submarines navigating on the surface."[83] Although coastal States were entitled to make rules regulating the conditions of innocent passage, they did not have the right to require prior authorization. Likewise, foreign flagged warships had a duty to respect local laws and regulations.[84] If a warship failed to comply with local laws and regulations after notice was given to the captain of the vessel, the only remedy available to the coastal State was to require the ship to depart the territorial sea.

The transit of foreign warships in territorial waters was not recognized as a right, but rather passage was accepted as a "'general rule a coastal State will not forbid.'"[85] This determination reflected the general consensus during the first half of the twentieth century, albeit tempered by recognition of a greater right to transit the territorial sea overlapped by a strait used for international navigation. Analysis by the *Columbia Law Review* in 1950, for example, concluded

> Generally, it appears that although warships do not as yet have a complete right of passage through ordinary territorial waters, they do possess, in peacetime, a qualified right of passage through littoral straits connecting two free seas. Such a development is in accord with the increasing recognition of the policy of freedom of the seas.[86]

In the end, the 1930 Conference provided a draft text that, although not adopted as a conference instrument, would inform the 1958 Conference and Conventions. No agreement emerged on the width of the territorial sea, and states stuck to the inclination they had going into the Conference. The United States continued its policy of a three nautical mile territorial sea.

In 1934, Persia adopted a law on the breadth of the territorial sea that claimed six miles.[87] The next year, the state changed its name to "Iran," a cognate of the word "Aryan," which has been suggested was done to strengthen friendly relations with Germany.[88] Although officially a neutral nation, Iran was invaded by Allied forces in 1941 soon after the German attack on the Soviet Union. Anglo-Russian armed forces occupied Iran until after the war.

---

83. *Id.* at 40.

84. *Id.*

85. Reeves, *supra* note 61, at 496.

86. Note, *Peacetime Passage by Warships through Territorial Straits*, 50 COLUM. L. REV. 220, 225 (1950).

87. Act Relating to the Breadth of the Territorial Waters and to the Zone of Supervision, July 19, 1934, *reprinted in* 1 UNITED NATIONS LEGISLATIVE SERIES: LAWS AND REGULATIONS ON THE REGIME OF THE HIGH SEAS, at 81, U.N. Doc. ST/LEG/SER.B/1, U.N. Sales No. 1951.V.2 (Jan. 11, 1951) [hereinafter Breadth of the Territorial Sea Act].

88. Ehsan Yarshater, *Communications*, 22 IRANIAN STUDIES 62, 62–63 (1989).

Electronic copy available at: https://ssrn.com/abstract=2472065

In 1956, the International Law Commission (ILC) met to prepare draft text for consideration at a universal Conference on the Law of the Sea. The First United Nations Conference on the Law of the Sea met in 1958 and produced four treaties and an Optional Protocol based on the earlier ILC work. The key agreement for purposes of straits and the territorial sea is the Convention on the Territorial Sea and the Contiguous Zone.[89] The agreement entered into force for the United States on September 10, 1964. Iran has signed but has not ratified the treaty.

B. The First Geneva Conference

As the First United Nations Conference on the Law of the Sea opened in Geneva in 1958, the width of the territorial sea was the greatest unresolved issue. The conference at Geneva, however, did not reach agreement on this fundamental question.

The maritime powers favored a three nautical mile zone in order to facilitate commercial and naval transit. Without widespread agreement on the width of the territorial sea, however, states would have to negotiate new treaties or agreements with each coastal State that is situated astride a strait in order to travel freely. This fragmented approach raised military risk and frustrated the purpose of a single rule set throughout the oceans that would facilitate travel without interruption or delay.

In less than one year — on April 12, 1959 — Iran amended its 1934 law and unilaterally claimed a twelve nautical mile territorial sea.[90] The United Kingdom protested the new claim as a threat to its vital economic and strategic interests. On October 12, 1959, the British diplomatic démarche rejected unilateral extensions of the territorial sea, but the protest was brushed aside by Tehran. Even with a broader territorial sea, Iran was not supportive of efforts to prescribe the right of innocent passage through international straits for all nations. Tehran complained that as a coastal State, its strategic and political interests were "highly important psychological factor[s],"[91] that did not lend to recognition of a general right of innocent passage for warships.

---

89. Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, 516 U.N.T.S. 205.

90. RUZNAMEHI RASMI KISHVARI SHAHANSHAHI [THE IMPERIAL IRANIAN OFFICIAL GAZETTE], Majmo 'eh-I qavanin, (Act Dated 22 Favaradin 1338 [Apr. 12, 1959] Amending Act Relating to the Breadth of the Territorial Sea and Contiguous Zone of Iran dated 24 Tir 1313 [July 19, 1934]) (Iran), *reprinted in* SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, Feb. 10, 1960, *Fifth Plenary Meeting*, art. 2, U.N. Doc. A/CONF.19/5 (Feb. 10. 1960); 16 UNITED NATIONS LEGISLATIVE SERIES: NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, at 18, U.N. Doc. ST/LEG/SER.B/16, U.N Sales No. E/F.74.V.2 (1974).

91. Second United Nations Conference on the Law of the Sea, Mar. 17–Apr. 26, 1960, *Seventeenth Meeting*, ¶ 16, U.N. Doc. A/CONF.19/C.1/SR.17 (Apr. 6, 1960), *reprinted in* OFFICIAL RECORDS OF THE SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 104 (1960) [hereinafter

Electronic copy available at: https://ssrn.com/abstract=2472065

The 1958 Convention was not a complete failure, as it codified the right of innocent passage in the territorial sea, even though States were unable to agree upon the actual width of the zone to which the navigational regime actually applied. Pursuant to article 14(1), all States, "whether coastal or not, shall enjoy the right of innocent passage through the territorial sea."[92] Article 14(4) provides greater fidelity to the concept of innocent passage. "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[93] The text on innocent passage has been imported verbatim into article 19(1) of UNCLOS.

The Convention also recognizes in article 16 that all states enjoy the right of innocent passage through straits used for international navigation. Under article 16(4), the right of innocent passage cannot be suspended by the coastal State: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."[94] Article 16(3), however, states that "Subject to the [foregoing rule that bars suspension of innocent passage], the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security."[95]

The Territorial Sea Convention was adopted in Geneva on April 29, 1958. On May 28, 1958, Iran signed the treaty. Tehran's representative to the Conference attached a reservation to his signature to the treaty that the right of even innocent passage was unavailable "so far as it relates to countries having no sea coast [along the strait]."[96] It was clear by the end of the First United Nations Conference in 1958 that the regime of innocent passage was unworkable for the major maritime powers. Article 14(6) of Territorial Sea Convention requires submarines to transit in innocent passage, meaning that they travel on the surface and show their flag. The Conference concluded the same year that the United States launched the nuclear-

---

Seventeenth Meeting].

92. Geneva Convention, *supra* note 89, art. 14(1).

93. *Id.* art. 14(4).

94. *Id.* art. 16(4).

95. *Id.* art. 16(3).

96. *Id.* at 262 (trans. Secretariat). The full reservation is as follows:

> In signing the Convention on the Territorial Sea and the Contiguous Zone, I make the following reservation: *Article 14*. The Iranian Government maintains the objection, on the ground of excess of competence, expressed by its delegation at the twelfth plenary meeting of the Conference on the Law of the Sea on 24 April 1958, to the articles recommended by the Fifth Committee of the Conference and incorporated in part in article 14 of this Convention. The Iranian Government accordingly reserves all rights regarding the contents of this article in so far as it relates to countries having no sea coast.

Id.

Electronic copy available at: https://ssrn.com/abstract=2472065

powered submarine, USS *Nautilus*. Although Nautilus was a fast-attack boat, it was a harbinger of the shift in nuclear strategy toward the most survivable component of the nuclear triad — ballistic missile nuclear submarines.

The Convention also did not provide any rights for aircraft to overfly the territorial sea, even over straits. Coastal States enjoyed complete and exclusive sovereignty over the airspace above the territorial sea, and no special rules specified greater rights over straits used for international navigation.[97] In sum, the definition of what constituted innocent passage was too subjective, as it appeared to depend on the purpose, destination, cargo, or activities conducted along the voyage.[98] The imprecision opened the door for conflicts between warships, submarines, and aircraft of maritime powers and coastal States bordering straits used by them.

C. The Second Geneva Conference

The Second United Nations Conference on the Law of the Sea was an abject failure. It convened in 1960 and did not even adopt a treaty instrument. A U.S. proposal came close to approval at the Conference, however. The United States advocated an extension of the territorial sea to six nautical miles in an effort to stave off the twelve nautical mile zone, which by then was viewed as inevitable.[99]

By then, more states situated along international straits began to challenge the right of foreign flagged warships to pass through the strait. Just two years after the 1958 Geneva Conference failed to determine the width of the territorial sea, Indonesia attempted to close off straits through the archipelago to foreign warships, or at a minimum require prior notification of warship transits. The width of the territorial seas and the right of (mostly Western) warships to transit in them was caught up in the post-colonial politics. Extension of the territorial sea from three to twelve miles was, in many respects, an act of self-actualization and an opportunity for newly-independent states to strike back at a legal system that they neither crafted nor felt protected their interests.

Iran joined the conclave of non-Western states in a proposal for a twelve nautical mile territorial sea.[100] Although the extension would close

97. *See, e.g.*, United Nations Conference on the Law of the Sea, Feb. 24–Apr. 27, 1958, *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session*, ¶¶ 17–20, U.N. Doc. A/CONF.13/4 (1958).

98. MYRES S. MCDOUGAL & WILLIAM T. BURKE, PUBLIC ORDER OF THE OCEANS 258 (1962).

99. *See, e.g.*, Second United Nations Conference on the Law of the Sea, Mar. 17–Apr. 26, 1960, *United States of America: Proposal*, art. 1, U.N. Doc. A/CONF.19/C.1/L.3 (Mar. 23, 1960), *reprinted in* OFFICIAL RECORDS OF THE SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 166 (1960).

100. Second United Nations Conference on the Law of the Sea, Mar. 17–Apr. 26, 1960, *Ethiopia, Ghana, Guinea, Indonesia, Iran, Iraq, Jordan, Lebanon, Libya, Mexico, Morocco, Philippines, Saudi Arabia,*

Electronic copy available at: https://ssrn.com/abstract=2472065

off fifty-four straits used for international navigation to free transit, the damage to U.S. deterrent capacity was regarded as "'within tolerable operating limits.'"[101] The Conference failed to adopt a draft treaty, although it came very close to agreement on a compromise proposal to recognize a six nautical mile territorial sea in conjunction with a six nautical mile contiguous zone for customs enforcement, for a total area under coastal State jurisdiction of twelve nautical miles from the shoreline. Since both the 1958 and 1960 Conferences were unable to fix the breadth of the territorial sea, however, the issue persisted as the greatest unresolved dilemma of oceans law.[102]

III. IRAN AND THE THIRD UNITED NATIONS CONFERENCE

Malta Ambassador Avid Pardo is credited with energizing the General Assembly to call for a Third Conference on the Law of the Sea. In 1967, Pardo proclaimed that a sea bed treaty was an essential instrument for all nations to share the "common heritage" of sea bed riches. At the 22nd Session of the General Assembly, he presented a broad vision for a North-South governance framework for sea bed mining in a moving speech that became a clarion call for developing states that wanted favorable adjustments in global governance.[103] It quickly became apparent, however, that the issue of legal rights to the wealth of the sea bed and ocean floor beyond areas of national jurisdiction presupposed the establishment of an agreement on the outer limit of the territorial sea. States were still split over the maritime powers' preference for a three nautical mile zone, and many developing states that wanted twelve nautical miles, or even 200 nautical miles. The issue led the Secretary-General of the United Nations to consult with member states to determine the feasibility of a third conference on the international law of the sea.[104]

Sudan, Tunisia, United Arab Republic, Venezuela and Yemen: Proposal, art. 1, U.N. Doc. A/CONF.19/C.1/L.2/Rev.1 (Apr. 11, 1960), *reprinted in* OFFICIAL RECORDS OF THE SECOND UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 165 (1960).

101. *Seventeenth Meeting*, *supra* note 91, at 106.

102. *See, e.g.*, Arthur H. Dean, *The Geneva Conference on the Law of the Sea: What Was Accomplished*, 52 AM. J. INT'L L. 607, 613–14 (1958); Arthur H. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 772–82 (1960).

103. Statement of Ambassador Avid Pardo, *in* U.N. GAOR, 22nd Sess., 1515th mtg. at 1, U.N. Doc. A/C.1/PV.1515 (Nov. 1, 1967); Statement of Ambassador Avid Pardo, *in* U.N. GAOR, 22nd Sess., 1516th mtg., U.N. Doc. A/C.1/PV.1516 (Nov. 1, 1967) (Declaration and treaty concerning the reservation exclusively for peaceful purposes of the sea-bed and of the ocean floor, underlying the seas beyond the limits of present national jurisdiction and the use of their resources in the interests of mankind).

104. G.A. Res. 2574 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7834, at 10 (Dec. 15, 1969).

Electronic copy available at: https://ssrn.com/abstract=2472065

Any negotiation on a law of the sea would have to include more than just sea bed resources. The maritime powers feared that reopening dialogue on a comprehensive law of the sea would invite unwelcome proposals to further restrict navigation, particularly through international straits. On the other hand, resolution of the uncertainty over navigational freedoms would promote maritime strategic interests. Against this backdrop, President Richard Nixon sought to reassert some control over the direction of the agenda of a future conference through a new proposal. The United States had come to accept that it was futile to resist the drive for a twelve nautical mile territorial sea, but needed a guarantee of freedom of navigation. While in agreement on the desirability of a sea bed treaty, the president declared

> It is equally important to assure unfettered and harmonious use of the oceans as an avenue of commerce and transportation, and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law of the sea treaty. This treaty would establish a 12-mile limit for territorial seas and provide for free transit through international straits.[105]

Nixon's compromise gained traction while the General Assembly went ahead to plan a third major conference on the law of the sea. Under the authority of the United Nations General Assembly, a Committee on the Use of the Sea and Ocean Beds beyond the Limits of International Jurisdiction for Peaceful Purposes (Seabed Committee) was formed to consider negotiation of a single comprehensive treaty.[106] Three subcommittees met between 1971 and 1973 to prepare draft articles for negotiation of a single comprehensive law of the sea treaty.[107] Subcommittee I focused on the international legal regime of sea beds beyond the limits of national jurisdiction. Subcommittee II had responsibility for developing a conference agenda, and it also considered, *inter alia*, exploring rules for territorial waters and international straits. Subcommittee III assessed marine environmental protection and marine scientific research.

In Subcommittee II, the debate over straits sprang from three questions, which at first separated the developed nations and traditional maritime powers from most of the developing states: What is the legal nature of the strait? What navigational regime applies in the strait? Is the regime of nav-

105. Statement About United States Ocean Policy, May 25, 1970, *in* 6 WEEKLY COMP. PRES. DOC. 677, 678 (1970). The President's statement was preceded several months in an outline of U.S. objectives by State Department Legal Adviser John R. Stevenson, *International Law and the Oceans*, 62 DEP'T ST. BULL. 339, 341 (1970).

106. G.A. Res. 2467A (XXIII), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7477 (1968), at 15, *reprinted in* 8 I.L.M. 201 (1969).

107. *Id.* (Committee on the Use of the Sea and Ocean Beds Beyond the Limits of International Jurisdiction for Peaceful Purposes).

Electronic copy available at: https://ssrn.com/abstract=2472065

igation the same for warships as merchant vessels? The Soviet Union, while still competing with the United States on other issues, joined the maritime powers on the issue of straits.

To address governance of straits, the United States introduced Draft Articles on the Territorial Sea and International Straits as Subcommittee II convened in 1971.[108] The U.S. proposal treated the three questions as indivisible. On July 30, 1971, the United States proposed that a navigational regime of high seas freedoms should apply in straits used for international navigation.[109] Under this scheme, ships and aircraft of all nations would enjoy the same freedom of navigation and overflight for the purpose of transit through international straits as they did on the high seas. The United Kingdom, the Soviet Union, Australia, the Netherlands, and Norway supported the American proposal. On August 3, 1971, Ambassador Stevenson delivered a statement in Subcommittee II of the Seabed Committee, reaffirming that the U.S. proposal on the regime of straits was indivisible from acceptance of a twelve nautical mile territorial sea.[110]

A. Innocent Passage in Straits

In March 1972, Iran and Oman signed a joint communiqué that included a pledge to cooperate in the maintenance of peace and security in the region and "the free passage of ships and freedom of movement through the Hormuz Straits and adjoining seas."[111] On July 17, 1972, Oman extended its territorial sea from three nautical miles to twelve nautical miles — for the first time the narrowest part of the Strait of Hormuz lay entirely in the territorial seas of a state bordering the strait.[112] The Omani decree recognized the principle of innocent passage for ships and aircraft of other states transiting the Strait of Hormuz.[113] The Omani laws mir-

108. U.S. Draft Articles on Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabeds Committee, 65 DEP'T ST. BULL. 261, 266 (1971).

109. U.S. Draft Articles on Territorial Sea, Straits, and Fisheries Submitted to U.N. Seabeds Committee, U.N. Doc. A/AC.138/SC.II/L.4, *reprinted in* 65 DEP'T ST. BULL. 261 (1971).

110. A summary of the work of the Subcommittee is provided in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, U.N. GAOR, 26th Sess., Supp. No. 21, U.N. Doc. A/8421, at 30 (1971).

111. *Joint Irani–Omani Communiqué*, OMAN NEWS, Mar. 1974, *reprinted in* 28 MIDDLE E.J. 303 (1974). Iran and Oman later signed an Agreement concerning Delimitation of the Continental Shelf between Iran and Oman. *See* BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, LIMITS IN THE SEAS, PUB. NO. 67, CONTINENTAL SHELF BOUNDARY: IRAN-OMAN 6–7 (1976).

112. 18 UNITED NATIONS LEGISLATIVE SERIES: NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, at 80–82, U.N. Doc. ST/LEG/SER.B/18, U.N. Sales No. E/F.76.V.2 (1976).

113. *See, e.g.*, Decree of 17 July 1972 Concerning the Territorial Sea, Continental Shelf and Exclusive Fishing Zones of the Sultanate of Oman, art. 1, *reprinted in* NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, at 23, U.N. Doc. ST/LEG/SER.B/16, U.N. Sales No. E/F.74.V.2 (1974).

Electronic copy available at: https://ssrn.com/abstract=2472065

rored Iran's revised 1934 statute that reserved the right to prohibit foreign warships from entering certain areas of the territorial sea.[114]

By 1975, well before the adoption of the regime of transit passage through international straits, the twelve nautical miles had become the accepted standard width of the territorial sea, yet its acceptance continued to be tied to freedom of navigation through straits.[115] While the width of the territorial sea from three to twelve nautical miles was viewed as inevitable, however, replacement of innocent passage with a more robust regime of transit passage came much more slowly.

At the Caracas session of the Conference in the summer of 1974, the Iranian delegate stated that the concept of freedom of navigation through straits should not deny the legal nature of the territorial sea, an area normally subject only to innocent passage.[116] Iran also submitted draft articles on August 21, 1974, that provided that only the warships and commercial vessels of nations with a coastline on the Persian Gulf are entitled to nonsuspendable innocent passage.[117] Iran had asserted the same argument in a reservation it filed upon signing the 1958 Territorial Sea Convention.[118] The rationale is that the Gulf is a semi-enclosed sea, and traffic from non-resident states could be considered as not innocent and subject to suspension by the coastal State.

Iran's draft articles provided that only warships and commercial vessels of nations with a coastline on the Persian Gulf should be entitled to nonsuspendable innocent passage.[119] Because the Gulf is a semi-enclosed sea, coastal States have special dispensation to disregard the normal regime of straits.[120] "The geographical characteristics . . . would have to be taken into account in determining the scope and extent of the coastal State's ju-

114. *See* Breadth of the Territorial Sea Act, *supra* note 87, at 81.

115. By December 1975, for example, the U.S. Department of State determined that of the 128 independent coastal States, eighty of them claimed a territorial sea of at least twelve nautical miles in width; fifty-seven claimed exactly twelve nautical miles. BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, LIMITS IN THE SEAS, PUB. NO. 36, NATIONAL CLAIMS TO MARITIME JURISDICTION (3rd rev. ed. 1975).

116. Third United Nations Conference on the Law of the Sea, 1973–1982, *Summary Records of Plenary Meetings: 23rd Plenary Meetings*, at 71–72, U.N. Doc. A/CONF.62/SR.23 (July 1, 1974).

117. Third United Nations Conference on the Law of the Sea, 1973–1982, *Summary Records of the Second Committee 38th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.38 (Aug. 13, 1974), *reprinted in* II OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 273 [hereinafter *Second Committee 38th Meeting*].

118. *See, e.g.*, LAW OF THE SEA, CONVENTION ON THE TERRITORIAL SEA AND CONTIGUOUS ZONE, DECLARATIONS AND RESERVATIONS, 3 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, Ch. XXI, at 417–418, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009).

119. *Second Committee 38th Meeting*, *supra* note 117, at 273.

120. *See, e.g.*, Third United Nations Conference on the Law of the Seas, 1973–1982, *Iran: Draft Articles on Enclosed and Semi-Enclosed Seas*, U.N. Doc. A/CONF.62/C.2/L.72 (Aug. 21, 1974), *reprinted in* III OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 237.

Electronic copy available at: https://ssrn.com/abstract=2472065

risdiction. Enclosed or semi-enclosed seas present[] more acute problems which could not be solved by global norms applicable to all oceans . . . ."[121] Iran styled its position as a balanced approach that took account not only of the needs of navigation but also of the need to protect the coastal State and conserve its resources against pollution.[122] Furthermore, Iran considered traffic through the Strait of Hormuz from non-resident states as probably not innocent and subject to suspension by the coastal State. For Iran, the requirement of a navigational regime of innocent passage for foreign warships was essential to give meaning to the idea that the oceans should be reserved for "peaceful purposes."[123]

Until the end of the Third United Nations Conference, Iran was adamant that only the regime of innocent passage applies in the Strait of Hormuz. Iran also had in mind a more restrictive version of innocent passage than what was adopted by UNCLOS. In August 1980, for example, Mr. Farivar of the Iranian delegation reiterated his country's position that even the right of innocent passage should not be applied to foreign warships in the territorial sea, since they are, by their very nature, not innocent. The "only concession" made by Iran was that warships would be permitted to transit a strait used for international navigation overlapped by territorial seas if it constitutes an "obligatory route . . . between two parts of the high seas."[124] Even in that case, however, "the passage of warships should take place with due respect for the sovereignty of the State bordering the strait."[125] Iran also opposed inclusion of the right of overflight through straits used for international navigation, "since the air space over that portion of the territory of the coastal State was, according to international law, subject to the sovereignty of that State."[126]

On several occasions Committee Two of the Conference debated whether coastal States could condition the right of innocent passage of warships. States were split into two camps. The major maritime powers — the United States, Japan, the United Kingdom, France, and the Soviet Un-

121. Third United Nations Conference on the Law of the Seas, 1973–1982, *Summary Records of Meetings of the Second Committee 6th Meeting*, ¶ 16, U.N. Doc. A/CONF.62/C.2/SR.6 (July 17, 1974), *reprinted in* II OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 115.

122. *See* Third United Nations Conference on the Law of the Seas, 1973–1982, *20th Meeting of the Third Committee*, ¶ 12, U.N. Doc. A/CONF.62/C.3/SR.20 (Apr. 10. 1975), *reprinted in* IV OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 90.

123. *See, e.g.*, Third United Nations Conference on the Law of the Seas, 1973–1982, *68th Plenary Meeting*, ¶¶ 24, 26, U.N. Doc. A/CONF.68/SR.68 (Apr. 26, 1976), *reprinted in* V OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 66.

124. Third United Nations Conference on the Law of the Seas, 1973–1982, *137th Plenary Meeting*, ¶ 1, U.N. Doc. A/CONF.62/SR.137 (Aug. 26, 1980), *reprinted in* XIV OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 41.

125. *Id.*

126. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

ion — naturally opposed broad coastal State competence to regulate foreign warships in innocent passage. A large bloc of States actually opposed innocent passage for warships altogether. During the final week of the substantive negotiations, there was still no middle ground.[127] During the last few days of negotiation, Gabon presented a formal amendment to article 21 of the treaty that would allow coastal States to require prior authorization or prior notification for passage of warships through the territorial sea.[128]

The new text would add a paragraph to article 21(1), concerning laws and regulations of the coastal State relating to innocent passage. The new provision would afford coastal states "the right to require prior authorization and notification for passage through the territorial sea."[129] The maritime powers were dogged in their opposition. Mr. Momtaz, the delegate from Iran, however, disagreed. He stated that "the coastal State had a responsibility to preserve the legitimate interests of international navigation in its territorial sea."[130] This duty, however, should not "be to the detriment of the interests and security of the coastal State," and therefore Iran supported the amendment to article 21 proposed by Gabon since it reflected Tehran's longstanding policy to insist on prior authorization for the passage of foreign warships.[131] By co-sponsoring the Gabon amendment on article 21, Iran hoped to reframe the balance of security interests in straits to inure to the benefit of the coastal State:

> The object was to give due weight to the security of the coastal State and to afford it the means of preventing attacks on its security or independence. Inasmuch as the territorial sea was part of the sovereign territory of the coastal State, there could hardly be objections to measures by the coastal State in the territorial sea which were intended to protect that State's security.[132]

---

127. Thomas A. Clingan, Jr., *Freedom of Navigation in a Post-UNCLOS III Environment*, 46 LAW & CONTEMP. PROBS. 107, 112 nn.23–27 (1983).

128. Third United Nations Conference on the Law of the Seas, 1973–1982, *Gabon: Amendments*, ¶ 1, U.N. Doc. A/CONF.62/L.97 (Apr. 13, 1982), *reprinted in* XVI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 217.

129. *Id.*

130. Third United Nations Conference on the Law of the Seas, 1973–1982, *172nd Plenary Meeting*, ¶ 34, U.N. Doc. A/CONF.62/SR.172 (Apr. 16, 1982), *reprinted in* XVI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 117 [hereinafter *172nd Plenary Meeting*].

131. *Id.*

132. *Id.* ¶ 35. Also see the original proposal at Third United Nations Conference on the Law of the Seas, 1973–1982, *Algeria, Bahrain, Benin, Cape Verde, China, Congo, Democratic People's Republic of Korea, Democratic Yemen, Djibouti, Egypt, Guinea-Bissau, Iran, Libyan Arab Jamahiriya, Malta, Morocco, Oman, Pakistan, Papua New Guinea, Philippines, Romania, Sao Tome and Principe, Sierra Leone, Somalia, Sudan, Suriname, Syria, Uruguay and Yemen: Amendment to Article 21*, U.N. Doc. A/CONF.62/L.117 (Apr. 13, 1982), *reprinted in* XVI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFER-

Electronic copy available at: https://ssrn.com/abstract=2472065

Similarly, Iran supported a proposal by Spain near the close of the Conference on April 13, 1983.[133] Spain sought to enhance coastal State control of aircraft flying through international straits, and strengthen the coastal State's hand in vessel-source pollution enforcement.[134] Three days later, Iran stated in plenary that the right to transit through international straits "should not be allowed to jeopardize the coastal State's security."[135]

> Passage through the straits must be innocent, in the true sense of the term. Iran would guarantee passage only to vessels that did not pose a threat to its security. It could not give an unconditional guarantee of freedom of navigation, [even through straits that] led to enclosed or semi-enclosed seas.[136]

Gabon withdrew the draft text in favor of another proposal, cosponsored by Iran, that added a reference to "security" after the word "immigration" in article 21(1)(h), which provides that the coastal State may enact laws to prevent infringement of its customs, fiscal, immigration, and sanitary laws.[137] Gabon withdrew the proposal only in response to an appeal by the President of the Conference, Ambassador Tommy T. B. Koh of Singapore. In exchange, the proponents sought and obtained a reaffirmation on the record by Ambassador Koh that their decision was "without prejudice to the rights of coastal States to adopt measures to safeguard their security interests, in accordance with articles 19 and 25 of the draft convention."[138] Article 25, for example, already permits the coastal State to temporarily suspend innocent passage for reasons of security. Since those provisions already had been accepted as within the rights of the coastal State, the United States downplayed the importance of Koh's statement. Thomas Clingan, Vice-Chairman of the U.S. delegation to the negotiations, concluded, it "cannot be said that the President's statement does more than restate the obvious."[139] "Accordingly, the traditional view of the maritime states that warships, like other ships, are entitled to a right of innocent passage in the territorial is still the law of the sea."[140]

ENCE ON THE LAW OF THE SEA [hereinafter *Amendment to Article 21*].

133. Third United Nations Conference on the Law of the Seas, 1973–1982, *Spain: Amendments*, U.N. Doc. A/CONF.62/L.109 (Apr. 13, 1982), *reprinted in* XVI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA.

134. *Id.*

135. *172nd Plenary Meeting*, *supra* note 130, ¶ 36.

136. *Id.*

137. *Amendment to Article 21*, *supra* note 132, at 225.

138. Third United Nations Conference on the Law of the Seas, 1973–1982, *176th Plenary Meeting*, ¶ 1, U.N. Doc. A/CONF.62/SR.176 (Apr. 26, 1982), *reprinted in* XVI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 225.

139. Clingan, *supra* note 127, at 112.

140. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

As stated before, Iran has signed, but has not ratified UNCLOS. At the time of signature, Iran issued a declaration that addresses the provisions of innocent passage, including the competence of the coastal State to require prior notice or permission for innocent passage in the territorial sea. Iran stated during the final session of the negotiations that articles 19 and 25, in conjunction with article 21, implicitly recognize the "rights of coastal States to take measures to safeguard their security interests, including the adoption of laws and regulations regarding, *inter alia*, the requirement of prior authorization for warships willing to exercise the right of innocent passage through the territorial sea."[141] Not only does Tehran claim that the right of innocent passage, rather than transit passage, applies in the Strait of Hormuz for states not party to UNCLOS, it also requires that foreign warships request and obtain prior authorization for the transit.

B. Nature of the "Package Deal"

The essence of the "package deal," is that interlocked legal regimes carefully and fairly balance the interests of flag, port, and coastal States. Costs are apportioned and benefits assigned in a comprehensive fashion. States Parties must either accept or, in the case of the United States and Iran, reject the entire agreement. At the conference in 1979, representative of Iran Mr. Kazemi stated as much when he cautioned against upsetting the package deal by reopening negotiation on the Informal Composite Negotiating Text (ICNT), which served as the working draft for the final text:[142]

> Admittedly, the informal composite negotiating text was far from satisfactory to all delegations, but none the less it represented a very careful balance between views that were often contradictory. Every effort should be made to maintain that precarious balance and the Conference must at all costs refrain from re-opening discussion of issues which had already been solved in ways that were acceptable to most of the parties concerned.[143]

---

141. Third United Nations Conference on the Law of the Seas, 1973–1982, *191st Plenary Meeting*, ¶ 70, U.N. Doc. A/CONF.62/SR.191 (Dec. 9, 1982), *reprinted in* XVII OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 106 [hereinafter *191st Plenary Meeting*].

142. The third and final revision of the Informal Composite Negotiating Text (ICNT) is contained in U.N. Doc. A/CONF.62/WP.10/Rev.3 (Sept. 22, 1980).

143. Third United Nations Conference on the Law of the Seas, 1973–1982, *45th Meeting*, U.N. Doc. A/CONF.62/BUR/SR.45 (Apr. 9, 1979), *reprinted in* XI OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 39–40.

Electronic copy available at: https://ssrn.com/abstract=2472065

The ICNT had been produced after extensive and detailed negotiations on each aspect of the treaty, and was shaped into the treaty.[144] In the closing session of the Conference, an Iranian delegate stated in plenary that the "package deal" was only reluctantly accepted by Tehran:

> Despite all these misgivings and difficulties we have had as regards some sections of the Convention — particularly the questions of the innocent passage of warships through the territorial sea, the participation of national liberation movements such as the Palestine Liberation Organization, the priorities and privileges provided for some industrial countries in connection with the sea-bed regime — for the sake of unanimity in the pursuit of common goals together with the Group of 77, the delegation of the Islamic Republic of Iran voted in favour of adopting the Convention.[145]

Furthermore, the essential bargain, from the Iranian point of view, was extension of the territorial sea to "only" twelve nautical miles, and a corresponding creation of the EEZ, rather than extension of the territorial sea from three to twelve nautical miles, but only in exchange for the right of transit passage through straits.[146] While some developing states certainly traded "only" a twelve nautical mile territorial sea in exchange for a 200 nautical mile EEZ, the center of the bargain on the expansion of the territorial sea from three to twelve nautical miles was recognition of the right of transit passage through straits used for international navigation.

Near the end of the Caracas session, for example, Chairman of the Second Committee Ambassador Aquilar of Venezuela stated that acceptance of a twelve-mile territorial sea and 200-mile EEZ was the "keystone of the compromise" in the treaty, and favored by a majority of delegations.[147] Acceptance of the formula of twelve and 200 was "dependent" on the resolution of other issues, and "especially [on] the issue of passage through straits used for international navigation."[148] Thus, the United States and many other countries, as well as the Chair of Committee II dur-

144. The ICNT (U.N. Doc. A/CONF.62/W.P.10) was preceded by the Informal Single Negotiating Text (ISNT) (U.N. Doc. A.CONF.62/W.P.8). In 1975 and 1976, an article-by-article debate on the ISNT and the result led to the Revised Single Negotiating Text (U.N. Doc. A/CONF.62/WP.8/Rev.1). This led to creation of the ICNT, which brought together, into a single text, the texts of the three committees. David H. Anderson, *Law-Making Processes in the UN System — Some Impressions*, 2 MAX PLANCK Y.B. UNITED NATIONS L. 23, 33–34 (1998).

145. *191st Plenary Meeting*, *supra* note 141, ¶ 66.

146. *See* Third United Nations Conference on the Law of the Seas, 1973–1982, *23rd Plenary Meeting*, ¶¶ 16, 18, U.N. Doc. A/CONF.62/SR.23 (July 1, 1974), *reprinted in* I OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 71.

147. Third United Nations Conference on the Law of the Seas, 1973–1982, *Statement by the Chairman of the Second Committee at Its 46th Meeting*, U.N. Doc. A.CONF.62/C.2/L.86 (Aug. 28, 1974), *reprinted in* III OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 242–43.

148. *Id.*

Electronic copy available at: https://ssrn.com/abstract=2472065

ing the negotiations, understand that the essential bargain in the Convention is acceptance by the maritime powers of a twelve nautical mile territorial sea in exchange for the right of transit passage through straits used for international navigation.

From the outset of the Third United Nations Conference, the United States was negotiating finer points of navigational regimes, while at the same time claiming that it already possessed them. John R. Stevenson, Chairman of the U.S. delegation, for example, stated that the United States "believe[s] we now have — and have always had — full high seas freedoms such as freedom of navigation and overflight beyond a three-mile territorial sea. We find the existence of these rights in straits used for international navigation confirmed by their historical and continuing exercise."[149]

Similarly, in a speech at Duke University in 1982, Ambassador James L. Malone, Chairman of the U.S. delegation to the Third United Nations Conference on the Law of the Sea stated:

> Particularly with respect to navigation rights, the history of the law of the sea has been predominantly a history of customary rules evolving through state practice. In this area the [Law of the Sea] Convention incorporates existing law, which will continue to apply to all states, not because of the Treaty, but because of the customary law underlying the Treaty. This is a fundamental, immutable, and time-honored principle of international law.[150]

Near the end of the Conference, and faced with a treaty it would not sign, the United States left nothing to chance and made a statement to drive home the point that coastal States may not condition innocent passage of warships on prior notification or consent.

> [Delegates also discussed the legal question of the rights and duties of States which do not become party to the Convention adopted by the Conference. Some of these speakers alleged that such States must either accept the provisions of the Convention as a "package deal" or forgo all of the rights referred to in the Convention. This supposed election is without foundation or precedent in international law. It is a basic principle of law that parties may not, by agreement among themselves, impair the rights of third parties or their obligations to third parties. Neither the Conference nor the

149. *Status Report on Law of the Sea Conference: Hearing Before the Subcomm. on Minerals, Materials and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong. 215 (1973) (statement of Ambassador John R. Stevenson, Chairman, U.S. Delegation to the Committee on Peaceful Uses of Seabed and Ocean Floor Beyond Limits of National Jurisdiction).

150. James L. Malone, *The United States and the Law of the Sea After UNCLOS III*, 46 LAW & CONTEMP. PROBS., no. 2, 1983, at 29, 33.

Electronic copy available at: https://ssrn.com/abstract=2472065

> States indicating an intention to become parties to the Convention have been granted global legislative power.
>
> The Convention includes provisions, such as those related to the régime of innocent passage in the territorial sea, which codify existing rules of international law which all States enjoy . . . . To blur the distinction between codification of customary international law and the creation of new law between parties to a convention undercuts the principle of the sovereign equality of States.
>
> The United States will continue to exercise its rights and fulfil its duties in a manner consistent with international law, including those aspects of the Convention which either codify customary international law or refine and elaborate concepts which represent an accommodation of the interests of all States and form part of international law.[151]

Although Iran is also not a party to UNCLOS, it signed the treaty upon its adoption by the Third United Nations Conference on the Law of the Sea in Montego Bay, Jamaica, on December 10, 1982. Iran clarified its position through an interpretative declaration on the subject of straits made under article 310 of the treaty.[152] Iran stated that upon signature, "[n]otwithstanding the intended character of [UNCLOS] being one of general application and of law making nature, certain of its provisions are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character."[153]

C. Transit Passage in Straits

The Third United Nations Conference on the Law of the Sea adopted the United Nations Convention on the Law of the Sea in 1982, and the Convention entered into force in 1994. The treaty contains a carefully tailored set of rules for different types of straits used for international navigation. The Strait of Hormuz illustrates the "classic" strait, in that it is used for international navigation "between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."154 Iran was unsuccessful in obtaining special status for straits connecting semi-enclosed seas to the high seas. Conventional appli-

151. Third United Nations Conference on the Law of the Seas, 1973–1982, *Note by the Secretariat*, add. 1–2, U.N. Doc. A/CONF.62/WS/37 (Mar. 8, 1983), *reprinted in* XVII OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 243.

152. Interpretative Declaration on the Subject of Straits, Islamic Republic of Iran, Dec. 10, 1982, Recognition of Rights under the Convention, *reprinted in* 1 LAW SEA BULL. 11, 17 (1983).

153. *Id.*

154. UNCLOS, *supra* note 4, art. 37.

Electronic copy available at: https://ssrn.com/abstract=2472065

cation of UNCLOS, therefore, indicates that transit passage is the appropriate navigational regime for the Strait of Hormuz under the terms of the treaty.155

Ships, submarines, and aircraft of all nations enjoy a right of transit passage through such straits. Transit is exercised "solely for the purpose of continuous and expeditious transit . . . ."156 Transit passage may be conducted in the "normal mode of operation" for ships, aircraft, and submarines.157 The term "normal mode" means that submarines are entitled to transit submerged, military aircraft may overfly in combat formation and with normal equipment operation, and surface ships may transit in a manner consistent with vessel security, to include formation steaming and launch and recovery of aircraft, if consistent with sound navigational practices. The coastal State may not impede transit through the strait.158

The straits have a dual nature, which continues to recognize that they are simultaneously territorial seas of coastal States. The regime of straits does not "affect the legal status of the waters forming such straits" or deprive the states bordering the strait of their sovereignty and jurisdiction over the waters, sea bed, and airspace.159

While conducting transit passage, ships may conduct formation steaming and launch and recover aircraft and other devices. Ships and aircraft have a duty, however, to "proceed without delay through or over the strait," and refrain from the threat of use of force "against the sovereignty, territorial integrity[,] or political independence of States bordering the strait[.]"160 Ships also have a duty to comply with "generally accepted international regulations, procedures and practices for safety at sea . . . ."161

The sovereignty and jurisdiction of the strait is exercised subject to the other rules in Part III, and, importantly, "other rules of international law."162 Unlike innocent passage through territorial seas, states bordering international straits may not suspend transit passage.163 Therefore, although the coastal State still exercises sovereignty over territorial seas overlapped by straits, the international community retains a virtually unmitigated easement that applies shoreline-to-shoreline and that permits transit under the water,164 in the air,165 and on the surface.166

---

155. *See, e.g.*, J. ASHLEY ROACH & ROBERT W. SMITH, EXCESSIVE MARITIME CLAIMS 268–69 (3rd ed. 2012).

156. UNCLOS, *supra* note 4, art. 38(2).

157. *Id.* arts. 38, 39.

158. *Id.* art. 38.

159. *Id.* art. 34(1).

160. *Id.* arts. 39(1)(a)–(b).

161. *Id.* art. 39(2)(a).

162. *Id.* art. 34(2).

163. *Id.* art. 44.

164. John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the*

Electronic copy available at: https://ssrn.com/abstract=2472065

Article 42 allows states bordering straits used for international navigation to adopt laws and regulations relating to transit passage with respect to safety of navigation and regulation of maritime traffic, prevention of fishing (including stowage of fishing gear), and customs, fiscal, immigration, and sanitary (health quarantine) matters. Littoral state laws also may be designed to prevent, reduce, and control pollution by giving effect to international regulations regarding "discharge of oil, oily wastes[,] and other noxious substances" in the strait.167 The rule, however, does not entitle the littoral State to develop regulations affecting construction, design, equipping, and manning of foreign-flagged ships. With the limited exception for violations that may cause or threaten to cause major damage to the marine environment of the strait, a bordering State may not enforce its laws against foreign flag vessels transiting the strait.168 Foreign ships exercising the right of transit passage shall comply with the regulations, but the rules must not discriminate in form or in fact among foreign flagged vessels.169

CONCLUSION

From the outset, negotiators at the Third United Nations Conference on the Law of the Sea from 1973–1982 envisioned a final treaty that would be an inclusive "package deal." States would not be entitled to pick and choose cafeteria-style among the rights and duties contained in the text, but rather were compelled to accept or reject a single anthology agreement.[170]

Iran maintains that the careful balance of rights and duties reflected in UNCLOS are available only as a specific condition of agreement of the package deal. Since the regime of transit passage is a *quid pro quo* for acceptance of other terms of the treaty, states not party to UNCLOS, such as the United States, are not entitled to exercise transit passage in the Strait

---

Sea, 74 AM. J. INT'L L. 77 (1980); Commander Ronald I. Clove, JAGC, USN, *Submarine Navigation in International Straits: A Legal Perspective*, 39 NAVAL L. REV. 103, 105–06 nn.5–6 (1990) (citing Navy Judge Advocate General (NAVY JAG ALEXANDRIA VA), Guidance for Judge Advocates Concerning the Transit Passage Regime in International Straits, DTG 061630Z JUN 88 (June 6, 1988)).

165. *See* Bernard H. Oxman, *Transit of Straits and Archipelagic Waters by Military Aircraft*, 4 SING. J. INT'L & COMP. L. 377 (2000).

166. William L. Schachte, Jr. & J. Peter A. Bernhardt, *International Straits and Navigational Freedoms*, 33 VA. J. INT'L L. 527 (1993).

167. UNCLOS, *supra* note 4, art. 42(1)(b).

168. 2 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, ¶ 42.10(g) (Satya N. Nandan & Shabtai Rosenne eds., 1993); *see also* UNCLOS, *supra* note 4, art. 233.

169. UNCLOS, *supra* note 4, arts. 42(2), (4).

170. *See, e.g.*, Alan Beesley, *The Negotiating Strategy of UNCLOS III: Developing and Developed Countries as Partners — A Pattern for Future Multilateral International Conferences?*, 46 LAW & CONTEMP. PROBS. 183, 187–88 (Ambassador Beesley was Chairman of the Drafting Committee of UNCLOS III.).

Electronic copy available at: https://ssrn.com/abstract=2472065

of Hormuz. To permit the United States to enjoy transit passage is to indulge Washington in the very type of "cherry picking" among the provisions of UNCLOS that the package deal was designed to prevent. The regime of transit passage is reserved only for parties to UNCLOS.

While the regime of transit passage in Part III of UNCLOS should have been the last word on the Strait of Hormuz, it is not. Iran and the United States are not parties to the Convention. For its part, the United States pledged, even before the end of the Third United Nations Conference that it opposed the treaty, but only due to Part XI on seabed mining (which itself subsequently was revised in an implementing agreement in 1994 to satisfy U.S. and other developed states' concerns).171 Iran never ratified the treaty either, however, so the Iranian-American bilateral relationship in the Strait is not governed by the terms of the treaty.

In the years since adoption of UNCLOS (1982) and its entry into force (1994), Iran and the United States have maintained a continuous dialogue of disagreement concerning U.S. transit rights in the Strait. Lacking diplomatic relations, the adversaries have traded diplomatic démarches using the embassy of Switzerland in Iran as an intermediary.172 The United States continues to defend the presence of American warships, submarines, and aircraft through the Strait of Hormuz as a lawful exercise of freedom of navigation.173

Likewise, Iran is steadfast in rejecting these claims. In a television interview in 2008, for example, Hoseyn Panahi-Azar, the director-general of the legal and international affairs department of the Iranian Foreign Ministry, stated that the regime of innocent passage applies to U.S. warship transits in the Strait of Hormuz. Transit through the Strait may not be suspended, he acknowledged, but Iran was entitled to "impose certain limitations based on their own laws [even] for transit passage."174

In the case of the United States, Tehran insists that transit passage is unavailable because the right is contractual in nature, binding the flag state of a transiting vessel and the coastal State situated along the strait. Panahi-

171. Third United Nations Conference on the Law of the Sea, 1973–1982, *192nd Plenary Meeting*, ¶¶ 1–4, U.N. Doc. A/CONF.62/SR.192 (Dec. 10, 1982) (Statement of Thomas Clingan, U.S., Dec. 9, 1982), *reprinted in* XVII OFFICIAL RECORDS OF THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 116–17; Presidential Statement on United States Oceans Policy, Mar. 10, 1983, *in* 19 WEEKLY COMP. PRES. DOCS 383, 383–84 (1983) [hereinafter Presidential Statement] (stating that the United States accepts the balance of interests relating to traditional uses of the oceans).

172. Embassy of Switzerland in Iran, Dip. Note No. 156/2007 to the Ministry of Foreign Affairs of the Islamic Republic of Iran, Oct. 21, 2007 (delivering Message of the United States of America to the Islamic Republic of Iran, Oct. 19, 2007).

173. *Id.*

174. *Iran TV Discussion on Strait of Hormuz Incident*, BBC WORLDWIDE MONITORING MIDDLE E.-POLITICAL, Jan. 13, 2008 (translating *Vision of the Islamic Republic of Iran*, NETWORK 2 (broadcast Jan. 12, 2008)).

Electronic copy available at: https://ssrn.com/abstract=2472065

Azar explains: "This [rule] means that only [the ships registered in] the member states of the convention have the right of passage. In the case of the law of the sea convention, neither Iran nor America is a member of the convention."175 Accompanied on the television show by Brigadier General Fadavi, acting commander of the Islamic Republic Guard Corps Navy, Panahi-Azar, stated that Iran had a special duty and enjoys recognized rights to facilitate traffic through the straits. In order to ensure safety and security along the route, Iran exchanges information with passing ships, such as speed, course, and type of vessel, in order to assist shipping. Since American ships enjoy only the more limited right of innocent passage, Iran asserts application of reasonable measures to manage innocent passage:

> Some countries will grant innocent passage without issuing permits. Some countries ask warships or military vessels to get permission beforehand. These are popular methods, most of the countries opt one of these methods. In the Persian Gulf, Iran and another country who is a member of the convention require military vessels to acquire prior permission before their innocent passage. Therefore if any military vessels enter Iranian waters without permission even if they are passing innocently it has violated the Iranian law.
>
> In addition, innocent passage has certain conditions and some of these vessels do not meet these conditions. They should not carry any potential threat against the costal countries.[176]

Although article 38(1) affords all ships and aircraft the right of transit passage, in the view of Iran, this regime does not capture ships and aircraft of non-parties. As a matter of treaty law, Tehran's view is correct. Article 36(1) of the Vienna Convention requires that provision of treaty rights to third states arise only in the case in which treaty parties intended the provisions to accord those rights.[177] There is no evidence that the drafters of the Third United Nations Conference contemplated according such rights to non-parties. Tehran offered article 34 of the Vienna Convention in support of its statement. The provision states that only parties to a treaty are entitled to benefit from the contractual rights created therein. Third parties inure no rights under a treaty, unless those are specifically set forth by the terms of the agreement.

If that is the case, then Iran advocates the regime of innocent passage applies to the United States in the Strait of Hormuz, and the regime is derived not from UNCLOS but based upon customary international law, the

175. *Id.*
176. *Id.*
177. Vienna Convention, *supra* note 14.

Electronic copy available at: https://ssrn.com/abstract=2472065

1958 Convention, and the *Corfu Channel Case*. Iran's declaration made upon signature of UNCLOS in 1982 preserves the country's prerogatives on the Strait of Hormuz, at least until such time as UNCLOS is universally accepted.

Although the United States has not signed UNCLOS,[178] the Senate Foreign Relations Committee prepared a report on the treaty in 2007 that outlines U.S. policy. The report contains carefully worded and bipartisan U.S. understandings related to transit passage:

> (A) all ships and aircraft, including warships and military aircraft, regardless of, for example, cargo, armament, means of propulsion, flag, origin, destination, or purpose, are entitled to transit passage and archipelagic sea lanes passage in their "normal mode"
>
> (B) "normal mode" includes, inter alia —
>
> (i) submerged transit of submarines;
>
> (ii) overflight by military aircraft, including in military formation;
>
> (iii) activities necessary for the security of surface warships, such as formation steaming and other force protection measures;
>
> (iv) underway replenishment; and
>
> (v) the launching and recovery of aircraft[.][179]

As a non-party, however, the regime of transit passage is unavailable to the United States as a right of treaty law. Customary international law is equal to treaty law in its binding effect, even though determining the terms of customary law sometimes may be more challenging. Is the United States correct in its claim that transit passage has entered into customary law? Certainly, the centuries of experience with peacetime deployment of warships attest that their movement through straits is "quite common, generally unnoticed, and usually without attendant controversy."[180] Indeed, states have used narrow maritime passageways on innumerable occasions; so the idea of their closure by coastal States as a matter of law is relatively new. On the other hand, Iran (and other states, to be sure) contested the right of warships transiting through international straits in the decades before adoption of UNCLOS. Indonesia, for example, was one of the strongest advocates for greater coastal State competence over international

178. President William J. Clinton signed the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 on July 29, 1994, and submitted the Convention and Agreement to the U.S. Senate for the first time on October 7, 1994. United Nations Convention on the Law of the Sea, Treaty Doc. No. 103-39 (1994).

179. S. FOREIGN RELATIONS COMM., CONVENTION ON THE LAW OF THE SEA, S. EXEC. REP. 110-9, at 20 (2007).

180. William T. Burke, *Who Goes Where, When, and How: International Law of the Sea for Transportation*, 31 INT'L ORG. 267, 270–71 (1977).

Electronic copy available at: https://ssrn.com/abstract=2472065

straits. The archipelagic nation objected to foreign warships transiting through the Sunda Strait during the 1960s, but after adoption of UNCLOS and the regime of transit passage, it has relented.

On February 18, 1960, Indonesia adopted into law Regulation No. 4, which abrogated its three nautical mile territorial sea claim and instituted a twelve nautical mile claim. The new law effectively enclosed the Sunda Strait inside Indonesia's territorial sea. The strait, which is only sixteen nautical miles wide at its narrowest point, included a high seas corridor for shipping traffic when the territorial sea was only three nautical miles in width. With the expansion of the width of the territorial sea, however, the high seas corridor disappeared, and with it the high seas freedom of transit enjoyed by naval forces since the era of Dutch colonization.

Indonesia began to challenge the right of foreign-flagged ships to transit through the archipelago. On August 27, 1964, for example, a British aircraft carrier task force steamed through the Sunda Strait, travelling toward Singapore. Indonesia and Malaysia were engaged in low-level hostilities at the time, as Sukarno sought to break up Malaysia and oust the British from their military bases.[181] The conflict threatened to draw Britain, and perhaps even America, into the conflict. The British had three aircraft carriers in the Far East at the time. Indonesia threatened "retaliatory action" if the U.K. flotilla re-transited the strait on the return journey from Singapore. To avoid provocation, however, the British issued a notification to Indonesia of the return transit and the fleet conducted innocent passage through the Lombok Strait rather than the Sunda Strait.[182]

Although freedom of navigation was exercised in straits used for international navigation, it was done within the framework of the three nautical mile territorial sea. Transit passage, however, is both a greater and a lesser right than what existed for maritime powers in centuries past. It is a greater right because it dispenses with the obstacle of coastal State maritime boundaries to transit the strait. Under transit passage, ships, aircraft, and submarines are no longer bound by the limitation of avoiding a coastal State's territorial sea, and may move through the strait on any track shoreline-to-shoreline.

Beyond three nautical miles, states were entitled to exercise the full range of high seas freedoms in international straits. Unlike transit passage,

181. Short-Term Prospects in the Malaysia/Indonesia Conflict, U.S. Special Intelligence Estimate, Sept. 16, 1964, SNIE 54/55-64, *in* U.S. DEP'T OF STATE, 26 FOREIGN REL. U.S., 1964–1968: INDONESIA; MALAYSIA-SINGAPORE; PHILIPPINES, Doc. No. 75, 158–60 (Edward C. Keefer & David S. Patterson eds., 2000). *See also* Note from Robert W. Komer of the National Security Council Staff to the President's Special Assistant for National Security Affairs (Bundy) (Sept. 4, 1964), *in* U.S. DEP'T OF STATE, 26 FOREIGN REL. U.S., 1964–1968: INDONESIA; MALAYSIA-SINGAPORE; PHILIPPINES, Doc. No. 71, 153 (Edward C. Keefer & David S. Patterson eds., 2000).

182. Commander in Chief, U.S. Pacific Command, Implications Indonesian *Mare Nostrum*, CINCPAC MSG 102244Z OCT 64, pts. I, II, Oct. 10, 1964 (Secret; declassified).

Electronic copy available at: https://ssrn.com/abstract=2472065

high seas freedoms allow essentially unfettered operations. Submarines may travel submerged and aircraft enjoy complete freedom of overflight. There is no requirement that the exercise of high seas freedoms be conducted in a manner that is "continuous and expeditious," as is the case with transit passage. Similarly, whereas patrols and survey activity is precluded while in transit passage, these activities, and many more, are part of high seas freedoms and other internationally lawful uses of the sea.

The United States is party to the 1958 Convention, and the terms of that treaty bind it as a matter of law. The only exception for adherence is if a rule more recent in time and derived from a binding treaty, or binding as a matter of custom and state practice, supersedes the 1958 Convention. Since the United States is not party to the 1982 Convention, it must rely on the argument that the regime of transit passage has entered into customary international law either before or after adoption of the Law of the Sea Convention, and therefore displaced earlier U.S. obligations arising from the 1958 treaty. In such case, the United States may assert, and in fact has asserted, that the regime of transit passage reflects customary international law and is binding on all states. The argument suggests that, as the rule arising later in time, transit passage, not innocent passage, is the appropriate navigational regime.

If Iran claims only a three nautical mile territorial sea, then it reasonably might expect other states to honor the corresponding regime of innocent passage through the territorial sea. In such case, however, Iran also must expect that states will exercise the full panoply of high seas freedoms and other internationally lawful uses of the sea outside of three nautical miles. Consequently, states would be entitled outside of three nautical miles to loiter, as the duty to operate "solely for the purpose of continuous and expeditious transit of the strait" would not attach.[183] Likewise, U.S. ships and aircraft would be under no obligation to "proceed without delay through . . . the strait" or "refrain from any activities other than those incident to their normal modes" of transit.[184]

In short, in areas beyond three nautical miles (rather than twelve miles), American warships and aircraft would not be required to comply with any of the provisions specific to Part III.[185] Within three nautical miles of the shoreline, foreign ships and aircraft would be required to observe the rules governing innocent passage — foregoing the rights of transit passage, including underwater transit or flight, in that part of the strait only. It is unclear on its face whether a return to this pre-1982 arrangement inures to the benefit of Iran or the United States. There is no public data on

183. UNCLOS, *supra* note 4, art. 38(2).

184. *Id.* arts. 39(1)(a), 39(1)(c).

185. *See, e.g.*, *id.* art. 39(1)(d) (noting that states shall "comply with other relevant provisions of this Part").

Electronic copy available at: https://ssrn.com/abstract=2472065

overflight and undersea transits in the Strait of Hormuz by U.S. aircraft and submarines. Given that the shipping channels lie almost entirely beyond three nautical miles, however, nearly all surface traffic would be unaffected by replacing the regime of transit passage with innocent passage in a much smaller territorial sea. The right of U.S. warships to loiter in the Strait, and establish a full-fledged sea basing presence beyond three nautical miles, would add a new dimension to American sea power in any contest against Iran. For example, U.S. Special Operations Forces could stage from small, floating bases beyond three miles from Iran in the Strait pursuant to high seas freedoms — activity that is disallowed by the regime of transit passage.

On the other hand, Iran's current claim of a twelve nautical mile territorial sea suggests that other nations are entitled to exercise freedom of navigation through the Strait, either in transit passage or the historic antecedent of general high seas freedoms, which is even more permissive. Instead, Iran has sought to preserve the navigational regime of innocent passage through the Strait, while at the same time incorporating the contemporary twelve nautical mile territorial sea. In short, Iran seeks to retain the 1958 navigational regime superimposed on the 1982 territorial sea. The Third United Nations Conference on the Law of the Sea rejected this very outcome as an attempt to dismantle the bargain of the package deal with cafeteria-style selection and rejection of legal provisions. Such practice has no basis in treaty or customary law.

The United States has been especially cognizant of the interrelationship between navigational regimes and corresponding coastal state zones of sovereignty and national jurisdiction. In 1983, President Reagan issued a statement on oceans policy in the wake of the adoption of UNCLOS at Montego Bay, Jamaica on December 10, 1982. "The United States," he declared,

> [was] prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans — such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.[186]

Some scholars suggest the regime of transit passage has entered customary international law not as a general right, perhaps, but at least for some particularly important straits.[187] The crystallization into customary

186. Presidential Statement, *supra* note 171.

187. R.R. CHURCHILL & A.V. LOWE, LAW OF THE SEA 113 (3rd ed. 1999) (customary law akin to transit passage exists in straits such as Dover and Gibraltar); Said Mahmoudi, *Customary International Law and Transit Passage*, 20 OCEAN DEV. & INT'L L. 157 (1989) (customary right of transit through

Electronic copy available at: https://ssrn.com/abstract=2472065

law of rights akin to transit passage, however, is inseparable from the general right of a twelve nautical mile territorial sea. To put it another way, coastal States that claim a twelve mile territorial sea as a feature of customary law cannot also reject the corresponding right of transit passage (or even a continuation of high seas freedoms) in the same strait.

A coastal State, such as Iran, may not select a twelve nautical mile territorial sea over waters forming a strait used for international navigation, dispense with the navigational regime of transit passage, and instead insist on enforcement of innocent passage any more than the United States could recognize only a three nautical mile territorial sea and then demand to exercise the right of transit passage within it. Ultimately, it is unclear which of the two nations has the superior position to determine this legal landscape. Both the twelve nautical mile territorial sea and the right of transit passage through international straits have either entered, or are on the cusp of, customary international law. The barest tinge of irresolution to the matter means the onus is on Iran either to accept the post-1982 legal status quo or raise it as a challenge before a competent international tribunal.

Strait of Hormuz).

Electronic copy available at: https://ssrn.com/abstract=2472065